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2706
No. 13044

**United States
Court of Appeals**
for the Ninth Circuit.

REPUBLIC PICTURES CORPORATION,
Appellant,
vs.

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES,
Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California
Central Division**

FILED
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SEP 28 1951

No. 13044

United States
Court of Appeals
for the Ninth Circuit.

REPUBLIC PICTURES CORPORATION,
Appellant,
vs.

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES,
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Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LOEB AND LOEB,
523 West Sixth St.,
Los Angeles 14, Calif.

For Appellee:

PACHT, TANNENBAUM & ROSS,
LOUIS E. SWARTS,
STUART L. KADISON,
WILD, CARLSON & REEVE,
DAVID S. DAVIS,
9700 Wilshire Blvd.,
Beverly Hills, Calif.

OPINION

[Clerk's note]: The Opinion of Judge Yankwich, filed April 26, 1951, is not reprinted here in the interest of economy. It is reported in 97 F. Supp. 360.

In the United States District Court, Southern
District of California, Central Division

No. 12260-Y

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES, a National Banking Association,
Plaintiff,

vs.

REPUBLIC PICTURES CORPORATION, a
Corporation,
Defendant.

AGREED STATEMENT ON APPEAL PURSU-
ANT TO RULE 76 OF THE RULES OF
CIVIL PROCEDURE

The parties hereto hereby stipulate and agree that the facts in the above-captioned case are as follows and this agreed statement is hereby submitted in lieu of reporters' and clerks' transcript herein.

The above-captioned action was begun by plaintiff's filing of its complaint herein in the United States District Court for the Southern District of California, Central Division, on September 7, 1950. Answer thereto was filed by defendant, Republic

Pictures Corporation, on October 18, 1950. Cause came on for trial on March 30, 1951, at which time the following facts were found to exist:

1. On September 26, 1944, defendant and one William Rowland, entered into an agreement in writing under the terms of which said Rowland agreed to produce a motion picture photoplay entitled, "A [2*] Song For Miss Julie," and further agreed that defendant should distribute the same. On October 2, 1944, said agreement was assigned by said Rowland, with the consent of defendant, to Pre-Em Pictures, Inc., a corporation. On October 2, 1944, Pre-Em Pictures, Inc., made, executed, and delivered to plaintiff a mortgage of chattels, including the copyright of said motion picture, as security for the repayment of loans made to Pre-Em Pictures, Inc., by plaintiff. The mortgage was recorded in the Copyright Office of the United States of America.

2. On January 31, 1945, Pre-Em Pictures, Inc., published the motion picture, "A Song For Miss Julie," with notice of copyright, and on February 20, 1945, deposited two copies of the photoplay in the Copyright Office of the United States of America, together with a claim to copyright for the first term of twenty-eight years, in the name of Pre-Em Pictures, Inc. A Certificate of Copyright Registration, Class L. Pub. No. 13089, was issued by the Copyright Office of the United States of America.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

3. Subsequently, on April 3, 1945, Pre-Em Pictures, Inc., made, executed and delivered to plaintiff another mortgage of said motion picture, including the copyright thereof. This mortgage was recorded in the Copyright Office of the United States of America on April 19, 1945.

4. The mortgages hereinabove referred to were expressly made subject to the rights of defendant under the distribution agreement hereinabove referred to. Under the terms of said mortgages Pre-Em Pictures, Inc., mortgaged, pledged, and assigned to plaintiff the following described property, where-soever situated and located, and whether then owned or thereafter acquired by Pre-Em Pictures, Inc.:

(a) All copyrights obtained or to be obtained in its completed form on a certain motion picture photoplay entitled, "A Song For Miss Julie" from a story by Michael Foster, together with any and [3] all other copyrights obtained or to be obtained in connection with the said picture.

5. In addition, the following described personal property was mortgaged, pledged, and assigned by said mortgagee to plaintiff by Pre-Em Pictures, Inc.:

That certain motion picture photoplay tentatively entitled, "A Song For Miss Julie," from a story by Michael Foster, together with any and all proceeds and avails thereof, and any and all properties and things of value pertaining thereto, specifically including the following:

(a) The motion picture rights to said story and such other rights thereto as mortgagor has or obtains.

(b) The treatment of said story for its motion picture use, together with all scripts used and to be used in connection with said picture.

(c) Motion picture rights to all music and musical compositions used and to be used in said picture for which motion picture rights must be obtained.

(d) All negatives, negative film, sound tracks, positive prints, cut-outs and trims connected with said picture, whether in completed form or in some stage of completion.

(e) The right of mortgagor to any sets, props and similar properties used or to be used in connection with said picture, until such time as said sets, props and similar properties are no longer useful and useable in connection with the production of said picture.

(f) The agreement dated September 26, 1944, with Republic Pictures Corporation (and all [4] amendments and renewals thereof) providing for the distribution of said picture, together with all proceeds thereof and therefrom.

(g) Subject to the rights of said distributor under said distribution agreement, the right to distribute said picture world wide, and all television and sub-standard width rights.

(h) All insurance policies connected with said picture, specifically including negative in-

surance, case insurance, and any insurance on producer, director or stars.

(i) Such rights as mortgagor has the present or future ability to pledge, mortgage or assign in and to all contracts and rights for the use of services and property in connection with the production of said picture, specifically including contracts for the services of directors, cameramen, stars, bit players, contracts for the processing of said film and contracts with studios for studio space and facilities in connection with the production of said picture.

(j) All copyrights on the story, story treatment, script, continuities and music and musical compositions, together with the right to copyright and all rights to renew or extend such copyright.

6. The mortgages were recorded in the Office of the County Recorder of Los Angeles County.

7. The completed motion picture photoplay was delivered to defendant for distribution and is still in distribution by the defendant. [5]

8. On September 20, 1948, plaintiff filed an action in the United States District Court for the Southern District of California, Central Division, entitled, "Security-First National Bank of Los Angeles, a national banking association, plaintiff, vs. Pre-Em Pictures, Inc., a corporation, et al., defendants," which action was numbered 8659-PH, in the files of said court. By said action plaintiff sought to foreclose both of the mortgages hereinabove refer-

(a) The motion picture rights to said story and such other rights thereto as mortgagor has or obtains.

(b) The treatment of said story for its motion picture use, together with all scripts used and to be used in connection with said picture.

(c) Motion picture rights to all music and musical compositions used and to be used in said picture for which motion picture rights must be obtained.

(d) All negatives, negative film, sound tracks, positive prints, cut-outs and trims connected with said picture, whether in completed form or in some stage of completion.

(e) The right of mortgagor to any sets, props and similar properties used or to be used in connection with said picture, until such time as said sets, props and similar properties are no longer useful and useable in connection with the production of said picture.

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(j) All copyrights on the story, story treatment, script, continuities and music and musical compositions, together with the right to copyright and all rights to renew or extend such copyright.

6. The mortgages were recorded in the Office of the County Recorder of Los Angeles County.

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red to. A Notice of Pendency of said action was recorded in the Copyright Office of the United States of America. In said action there was no diversity of citizenship, and jurisdiction was premised upon the theory that the action arose under an Act of Congress relating to copyrights dated March 4, 1909, 35 Stat. 1084, Ch. 320, Sec. 42, Title 17, U.S.C.; Sec. 42, 61 Stat. 652, Ch. 391, Sec. 1, Title 17, U.S.C.; Sec. 28, Title 28, U.S.C.; Sec. 1338(a).

9. On August 13, 1949, the United States District Court for the Southern District of California, Central Division, the Honorable Peirson M. Hall presiding, rendered a decree in favor of plaintiff foreclosing the mortgages hereinabove referred to. Said decree has become final, and a certified copy thereof was recorded in the Copyright Office of the United States of America. Said decree provided for the sale of the properties mortgaged by the said mortgages, and pursuant thereto the United States Marshal for the Southern District of California sold said property at public auction on October 5, 1949, to plaintiff. A certified copy of the Marshal's Certificate of Sale on Foreclosure was recorded in the Copyright Office of the United States of America and in the Office of the County Recorder of Los Angeles County.

10. Defendant in the present action contended that plaintiff had not received good title to the above-described property by reason of the aforementioned foreclosure sale for the reason that the court which decreed and ordered said foreclosure

sale was without jurisdiction so to do, and defendant therefore refused to recognize [6] plaintiff's title in and to said property, whereupon the above action for declaratory relief was commenced.

In the above-captioned action there was diversity of citizenship between the parties in that plaintiff Security-First National Bank of Los Angeles was a national banking association doing business and having a principal place of business in California, and therefore, for purpose of jurisdiction considered as a California corporation and defendant Republic Pictures Corporation was and is a corporation organized and existing under and by virtue of the laws of the State of New York. The amount in controversy in the above-captioned action (the properties mortgaged by the aforementioned chattel mortgages), exceeded the sum of Three Thousand Dollars (\$3,000.00), exclusive of cost and interest.

The sole issue presented upon the foregoing facts was whether the United States District Court for the Southern District of California, Central Division, had jurisdiction in the action entitled, "Security-First National Bank of Los Angeles, a national banking association, plaintiff, vs. Pre-Em Pictures, Inc., a corporation, et al., defendants," there having been no diversity of citizenship in said action, and jurisdiction having existed, if at all, therefore, only under Title 28, U.S.C. Sec. 1338(a). On April 26, 1951, the United States District Court for the Southern District of California, Central Division, the Honorable Leon R. Yankwich, Judge

presiding, entered its written decision in the above-captioned action a copy of which decision is attached hereto as Exhibit "A" hereof, in which decision said court held that the United States District Court for the Southern District of California, Central Division, did have jurisdiction in said foreclosure action by virtue of Title 28, U.S.C. Sec. 1338(a), and ordered that judgment in the above-captioned action should therefore go for the plaintiff.

11. Thereafter and on June 14, 1951, said court made its Findings of Fact and Conclusions of Law, finding among other things, [7] that the requisite diversity of citizenship and jurisdictional amount as hereinabove mentioned in paragraph 10 hereto set forth did exist and entered judgment in the above-captioned action in favor of plaintiff herein. A copy of said judgment is attached hereto as Exhibit "B" hereof.

12. Thereafter and on June 19, 1951, defendant filed in the United States District Court for the Southern District of California, Central Division, its Notice of Appeal in the above-captioned action. A copy of said Notice of Appeal is attached hereto as Exhibit "C" hereof.

Statement of Points Relied Upon by Appellant

As heretofore set forth, the sole legal issue presented in the above-captioned action was whether the United States District Court for the Southern

District of California had jurisdiction to enter a decree of foreclosure in the foreclosure action heretofore referred to. The sole point, therefore, upon which appellant herein relies is as follows:

The said foreclosure action being one in which there was no diversity of citizenship and not being a "civil action arising under any Act of Congress relating to patents, copyrights or trade-marks," the United States District Court for the Southern District of California lacked jurisdiction to enter the foreclosure decree in that action and the United States District Court for the Southern District of California, Central Division, erred in the above-captioned action in holding that said court did have the requisite jurisdiction.

LOEB AND LOEB,

HERMAN F. SELVIN,

SAUL N. RITTENBERG,

HARRY L. GERSHON,

By /s/ HARRY L. GERSHON,

Attorneys for Appellant.

LOUIS E. SWARTS, and

STUART L. KADISON, of

PACHT, TANNENBAUM &
ROSS;

JOSEPH S. DUBIN;

DAVID S. DAVIS, of

WILD, CARLSON & REEVE,

By /s/ STUART L. KADISON;

Attorneys for Appellee. [8]

The foregoing Agreed Statement is hereby approved.

/s/ LEON R. YANKWICH,

District Judge. [9]

EXHIBIT A

In the United States District Court Southern
District of California, Central Disision

No. 12260-Y

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES, a National Banking Association,
Plaintiff,

vs.

REPUBLIC PICTURES CORPORATION, a
Corporation,

Defendant.

Honorable Leon R. Yankwich, Judge.

DECISION

The above-entitled cause, heretofore, argued and submitted, is now decided as follows:

Upon the grounds stated in the Opinion filed herewith, judgment and declaration will be for the plaintiff.

(1) That the foreclosure proceedings instituted in the United States District Court for the Southern District of California, Central Division, entitled "Security-First National Bank of Los Angeles, etc., plaintiff, vs. Pre-Em Pictures, Inc., etc., et al., defendants," being No. 8659-PH, in the files of said Court, was and is a proceeding arising under an Act of Congress relating to copyrights, dated March 4, 1909, 35 Stat. 1084, Ch. 320, Sec. 1, Title 17, U.S.C., Sec. 28; Title 28, U.S.C., Sec. 1338(a).

(2) That said Court had jurisdiction to render said decree of foreclosure in said proceedings:

(3) That the plaintiff is the legal owner of the [10] personal property referred to in the chattel mortgages and said decree of foreclosure and certificate of sale, subject to the rights of defendant under the distribution agreement.

(4) That the plaintiff and defendant may enter into any arrangement covering the distribution of said motion picture photoplay or providing for the termination of said distribution agreement without the necessity of plaintiff's furnishing any indemnity agreement.

(5) Costs to the plaintiff.

Findings and Judgment to be prepared by counsel for the plaintiff under Local Rule 7.

Done in open court this 26th day of April, 1951.

LEON R. YANKWICH,
Judge. [11]

EXHIBIT B

In the United States District Court Southern
District of California, Central Division

No. 12260 Y

SECURITY-FIRST NATIONAL BANK of LOS
ANGELES, a National Banking Association,
Plaintiff,

vs.

REPUBLIC PICTURES CORPORATION, a
Corporation,
Defendant.

JUDGMENT

The above-entitled cause, having come on regularly for trial on the 30th day of March, 1951, in the above-entitled Court, before the Hon. Leon R. Yankwich, United States District Court Judge, without a jury, and plaintiff, appearing by its attorneys, Louis E. Swarts; Joseph S. Dubin; Wild, Carlson & Reeve; and David S. Davis; and defendant, appearing by its attorneys Loeb & Loeb; Saul N. Rittenberg; and Harry Gershon; and Bank of America National Trust & Savings Association, appearing as Amicus Curiae by its attorneys, Hugo A. Steinmeyer; Robert H. Fabian; and Robert Van Buskirk; and the Stipulation of Facts filed by the parties having been received in evidence, and evidence, both oral and documentary having been [12] introduced and the cause argued, and the Court, having heretofore made and caused to be filed, its

written Decision, Opinion and Findings of Fact and Conclusions of Law, and the Court, being fully advised, and good cause appearing therefor,

It Is Ordered, Adjudged and Decreed
as follows:

I.

That the foreclosure proceedings instituted in the United States District Court for the Southern District of California, Central Division entitled "Security-First National Bank of Los Angeles, a national banking association, Plaintiff, vs. Pre-Em Pictures, Inc., a corporation, et al., Defendants," being No. 8659-PH in the files of said court, was and is a proceeding arising under an Act of Congress relating to copyrights dated March 4, 1909, 35 Stat. 1084, Ch. 320, Sec. 1, Title 17, U.S.C. Sec. 28; Title 28, U.S.C. Sec. 1338(a).

II.

That the United States District Court for the Southern District of California, Central Division, had jurisdiction to render the Decree of Foreclosure made and entered in said proceedings.

III.

That plaintiff is the legal owner of the personal property referred to in the chattel mortgages and said Decree of Foreclosure and the Certificate of Sale given pursuant thereto, subject to the rights of defendant under the Distribution Agreement.

IV.

That plaintiff and defendant may enter into any arrangement covering the distribution of the motion picture photoplay involved [13] in said foreclosure proceedings or providing for the termination of said Distribution Agreement and that plaintiff need not furnish any indemnity agreement in connection therewith.

V.

That plaintiff shall recover its costs herein.

The Clerk is directed to enter this Judgment.

Dated at Los Angeles, California, this .. day of June, 1951.

LEON R. YANKWICH,
United States District Court
Judge.

Approved as to form:

LOEB & LOEB,
SAUL N. RITTENBERG,
By SAUL N. RITTENBERG,
Attorneys for Defendant. [14]

EXHIBIT C

In the United States District Court, Southern
District of California, Central Division

No. 12260-Y

SECURITY-FIRST NATIONAL BANK of LOS
ANGELES, a National Banking Association,
Plaintiff,

vs.

REPUBLIC PICTURES CORPORATION, a
Corporation,
Defendant.

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

You Will Please Take Notice that defendant
hereby appeals to the United States Court of Ap-
peals for the Ninth Circuit from all parts of the
judgment heretofore entered in the above-entitled
action on June 14, 1951.

Dated June 19, 1951.

LOEB and LOEB,

SAUL N. RITTENBERG,

HARRY L. GERSHON,

By /s/ HARRY L. GERSHON,
Attorneys for Defendant.

[Endorsed]: Filed July 30, 1951. [15]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

It is hereby ordered that the time within which to file the Record on Appeal in the above-entitled case and docket said Appeal is extended to and including Thursday, August 2, 1951.

Dated July 30, 1951.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed July 30, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 16, inclusive, contain the original Agreed Statement on Appeal Pursuant to Rule 76 of the Rules of Civil Procedure and Order Extending Time which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 30th day of July, A. D. 1951.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13044. United States Court of Appeals for the Ninth Circuit. Republic Pictures Corporation, Appellant, vs. Security-First National Bank of Los Angeles, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 6, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13044

REPUBLIC PICTURES CORPORATION,
Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES,

Appellee.

APPELLANT'S STATEMENT OF POINTS
UNDER RULE 19(16)

Pursuant to rule 19(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant states herewith the sole point to be relied upon by it in the within appeal, to wit:

The United States District Court for the Southern District of California, Central Division, erred in holding that an action for the foreclosure of a mortgage of a copyright is an action arising under an Act of Congress relating to copyrights and is therefore within the jurisdiction of a United States District Court, notwithstanding that there is no diversity of citizenship in said action.

Appellant and appellee have heretofore stipulated and agreed that the record material to the consideration of the within appeal consists solely and exclusively of the agreed statement heretofore subscribed by appellant and appellee and approved by the Hon. Leon R. Yankwich, Judge of the United

States District Court for the Southern District of California, Central Division, which agreed statement has heretofore been filed with the above-entitled court. Said agreed statement is therefore designated by appellant, together with the opinion of the trial court reported at 97 F. Supp. 360, as the record on appeal pursuant to Rule 19(6).

LOEB and LOEB,

HERMAN F. SELVIN,

SAUL N. RITTENBERG,

HARRY L. GERSHON,

By /s/ HARRY L. GERSHON,

Attorneys for Appellant.

[Endorsed]: Filed August 10, 1951.

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No. 13044

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REPUBLIC PICTURES CORPORATION,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Appellee.

APPELLANT'S OPENING BRIEF.

LOEB AND LOEB,

HERMAN F. SELVIN,

SAUL N. RITTENBERG,

HARRY L. GERSHON,

523 West Sixth Street,

Los Angeles 14, California,

Attorneys for Appellant.

FILED

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No. 13044

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REPUBLIC PICTURES CORPORATION,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Appellee.

APPELLANT'S OPENING BRIEF.

Opinion of the District Court.

The opinion of the District Court in the above-entitled action, per Yankwich, District Judge, is reported in *Security-First National Bank of Los Angeles v. Republic Pictures Corporation* (S. D. Cal.) 97 Fed. Supp. 360.

Statement of Jurisdiction.

The jurisdiction of the Court of Appeals to review the judgment of the District Court herein is believed to be conferred by Title 28, *United States Code*, Section 1291.

The complaint herein for declaratory relief was filed by appellee in the United States District Court for the Southern District of California, Central Division, on September 7, 1950. Answer thereto was filed by appellant on October 18, 1950. [Tr. pp. 3-4.] It affirmatively appears from the complaint herein and from the Findings

of Fact of the District Court that appellee was and is a National Banking Association doing business in the Southern District of California, and therefore for purposes of federal jurisdiction considered to be the equivalent of a California corporation, and that appellant was and is a corporation organized and existing under and by virtue of the laws of New York, with a principal place of business in the Southern District of California. [Tr. p. 9.] The amount in controversy herein, exclusive of costs and interest, exceeded the sum of \$3,000.00. [Tr. p. 9.] It is therefore believed that the jurisdiction of the District Court herein is conferred by Title 28, *United States Code*, Section 1332(1).

The final judgment of the District Court from which this appeal is taken was entered on June 14, 1951. [Tr. p. 10, Ex. B.] Appellant served and filed its Notice of Appeal therefrom on June 19, 1951. [Tr. p. 10, Ex. C.]

Statement of the Case.

Appellee was and is the mortgagee under a chattel mortgage dated October 2, 1944, which was executed by Pre-Em Pictures, Inc., a California corporation, to secure the repayment of certain loans and advances made to Pre-Em by appellee. The mortgage covered, among other items of personal property, all copyrights obtained and to be obtained on a motion picture photoplay based on a story entitled "A Song for Miss Julie." [Tr. p. 4.] The photoplay in question was one then to be produced by Pre-Em and released and distributed by appellant under the terms of a written agreement between appellant and William Rowland dated September 26, 1944, which agreement had

been assigned by Rowland to Pre-Em. The mortgage, together with a subsequent mortgage dated April 3, 1945, covering the same property, was recorded in the United States Copyright Office and in the Office of the Los Angeles County Recorder. [Tr. pp. 4-7.]

Subsequent to the production of the motion picture by Pre-Em and its release by appellant, Pre-Em defaulted in the repayment of the loans and advances secured by the mortgages, and on September 20, 1948, appellee filed an action against Pre-Em and others in the United States District Court for the Southern District of California, Central Division (hereinafter referred to as the "foreclosure action") seeking to foreclose the mortgages. [Tr. p. 7.] On August 13, 1949, the District Court in the foreclosure action entered a decree in favor of appellee (plaintiff in that action) foreclosing the mortgaged properties, which properties were sold at public auction by the United States Marshal to appellee on October 5, 1949. [Tr. p. 8.] A certified copy of the certificate of sale was recorded in both the Copyright Office and the Office of the Los Angeles County Recorder. [Tr. p. 8.]

There was concededly no diversity of citizenship in the foreclosure action, and the jurisdiction of the District Court therein was premised upon the theory that the action was brought within the provisions of Title 28, *United States Code*, Section 1338(a). The issue of jurisdiction was not raised or litigated in the foreclosure action. No appeal was taken and the decree has since become final.

Appellant herein, the distributor of the motion picture under its agreement with the mortgagor's assignor, refused to recognize the title or interest held by appellee in the motion picture, insofar as that title or interest derived from the purchase thereof at the foreclosure sale for the reason that, there being no diversity of citizenship in the foreclosure action, the District Court in that action lacked jurisdiction to decree the foreclosure of the mortgage or the sale of the mortgaged properties. [Tr. p. 8.] This action for declaratory relief was thereupon instituted.

The material facts in the present action as above summarized were not in dispute, the only disputed issue being whether, upon such facts, the District Court in the foreclosure action acted within its jurisdiction. The District Court in the present action found the facts herein to be substantially as hereinabove summarized and concluded therefrom that the court in the foreclosure action had jurisdiction to decree the foreclosure and sale under Title 28, *United States Code*, Section 1338(a). Judgment for appellee was ordered and entered accordingly. [Tr. p. 10.]

Specification of Error.

The District Court erred in holding that the foreclosure action arose under an Act of Congress relating to copyrights and was therefore within the jurisdiction of the United States District Court, notwithstanding the admitted lack of diversity of citizenship.

Summary of the Argument.

I.

The United States District Court is a court of limited, not general, jurisdiction. Its power to hear and decide a given case must be derived clearly and expressly from a given statute, or it does not exist.

II.

An action does not arise under an Act of Congress relating to patents or copyrights unless it requires a determination of the validity, construction or application of such an act. Section 1338(a) does not apply to cases in which a patent or copyright is only incidentally, albeit necessarily, involved in the determination of a primary non-federal question.

A. A controversy over a contract relating to the licensing, use or assignment of a patent or copyright, or over the title to a patent or copyright, is not a case “arising under” the patent or copyright laws.

B. A suit to foreclose a mortgage does not present a federal question. Nor is one created by reason of the fact that the property mortgaged is a copyright.

C. No Act of Congress makes an action to foreclose a mortgage on a copyright a subject of federal jurisdiction.

III.

Even if the claimed inadequacy or deficiency of the remedy available in the state court may be relied upon to read into Section 1338(a) the implication of federal jurisdiction, no such inadequacy or deficiency is inherent in the foreclosure decree of a state court.

ARGUMENT.

I.

The United States District Court Is a Court of Limited, Not General Jurisdiction. Its Power to Hear and Decide a Given Case Must Be Derived Clearly and Expressly From a Specific Statute, or It Does Not Exist.

No rule is better established in the field of federal jurisdiction than the rule that in any given case, a federal court is presumptively acting in excess of its jurisdiction. Federal jurisdiction is never presumed to exist; it must be affirmatively established by reference to express and unmistakable statutory mandate. [*Kline v. Burke Construction Co.*, 260 U. S. 226, 234; *Chicot Drainage District v. Baxter State Bank*, 308 U. S. 371, 376; *People ex rel. McColgan v. Bruce* (C. C. A. 9), 129 F. 2d 421, 423; *Credit Bureau of San Diego v. Petrasich* (C. C. A. 9), 97 F. 2d 65, 67.]

Federal jurisdiction does not arise by implication or inference from a statute under which Congress *might have* conferred jurisdiction, but did not do so expressly [*Detroit Trust Co. v. Steamer Thomas Barlum*, 293 U. S. 21, 33; *Emlenton Refining Co. v. Chambers* (C. C. A. 3), 14 F. 2d 104, 105], nor can it spring up *sua sponte* to fill any possible jurisdictional gap that may appear to have been created by the failure of Congress to make the grant of jurisdiction as broad as it might have been or by any real or fancied inadequacy of the remedy available in the state courts. [*Jordine v. Walling* (C. C. A. 3), 185 F. 2d 662, 667; *Richard H. Oswald Co. v. Leader* (E. D. Pa.), 20 Fed. Supp. 876, 877; *The Emma Giles* (D. C. Md.), 15 Fed. Supp. 502, 506-507.] Moreover, if there is any real doubt as to whether the statute

confers jurisdiction, that doubt is to be resolved against the jurisdiction of the federal court. [*The Emma Giles*, *supra*, 15 Fed. Supp. at 508.]

Occasional tendencies, such as that manifested in the present case, to enlarge federal jurisdiction by engrafting, upon the statute upon which reliance is placed, implications or inferences that are neither clearly nor necessarily raised by the statute itself have been emphatically condemned by the United States Supreme Court. As stated by Mr. Justice Reed in the most recent decision of the court on this subject, "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." [*American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 95 L. Ed. Adv. Ops. 473, 480; *Detroit Trust Co. v. Steamer Thomas Barlum*, 293 U. S. 21, 32.] If federal jurisdiction is not expressly conferred by statute, neither equity nor necessity nor judicial interpretation can create it.

Manifestly, therefore, the problem presented by this appeal is not whether Congress could have provided for federal jurisdiction of actions to foreclose mortgages of copyrights, nor whether it should have, nor yet whether practical considerations would make the federal courts a better forum for such actions. These considerations are totally irrelevant. The sole problem here presented is whether such jurisdiction has in fact been conferred by any express provision of any federal statute.

Concededly, the *only* statute under which such jurisdiction can possibly be said to exist is Title 28, *United States Code*, Section 1338(a):

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights or trade-marks.

Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.”

Unless it can be said, without the aid of implication, inference or judicial “interpretation,” that the foreclosure of a mortgage is such an action, the district court had no jurisdiction of the foreclosure action, and the judgment herein must be reversed.

II.

An Action Does Not Arise Under an Act of Congress Relating to Patents or Copyrights Unless It Requires a Determination of the Validity, Construction or Application of Such an Act. Section 1338(a) Does Not Apply to Cases in Which a Patent or Copyright Is Only Incidentally, Albeit Necessarily, Involved in the Determination of a Primary Non-Federal Question.

A. A Controversy Over a Contract Relating to the Licensing, Use, or Assignment of a Patent or Copyright, or Over the Title to a Patent or Copyright, Is Not a Case “Arising Under” the Patent or Copyright Laws.

The principles governing the determination of whether an action comes within the provisions of Section 1338(a) are precisely the same as those governing the determination whether a controversy presents a “federal question” under Title 28, *United States Code*, Section 1331.¹ Whether an action is claimed to arise under “any Act of Congress relating to . . . copyrights” [Section 1338(a)] or under “the Constitution, laws and treaties

¹“The district courts shall have original jurisdiction of *all civil actions* wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and *arises under the Constitution, laws and treaties of the United States.*” (Italics ours.)

of the United States" [Section 1331], this rule is well established:

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily or for that reason alone, one arising under those laws, for *a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.*" [Shulthis v. McDougal, 225 U. S. 561, 569; Teague v. Brotherhood of Locomotive Firemen (C. C. A. 6), 127 F. 2d 53, 55. Italics ours.]

Based upon this principle, it has been repeatedly held that Section 1338(a) creates federal jurisdiction wherever the validity or infringement of a patent or copyright is the primary issue, but that such jurisdiction does not arise in cases involving rights or interests in or relating to patents or copyrights, merely because of the fortuitous circumstance that a patent or copyright is the subject-matter in which such rights or interest are asserted. A federal court consequently has no jurisdiction of a suit for royalties arising out of a contract for the sale of a patent or copyright [*Danks v. Gordon* (C. C. A. 2), 272 Fed. 821, 827; *Teas v. Albright* (D. N. J.), 13 Fed. 406, 411; *Leaver v. Parker* (C. C. A. 9), 121 F. 2d 737, 739; *MacGregor v. Westinghouse Elec. & Mfg. Co.* (W. D. Pa.), 45 Fed. Supp. 236, 238; *Routh v. Boyd* (D. Ind.), 51 Fed. 821, 823], or a suit to compel the assignment of a patent or copyright pursuant to a contract, or to compel the reassignment thereof under a contractual provision for forfeiture, or a suit to cause execution upon a patent or copyright [*Pratt v. Paris Gas Light & Coke Co.*, 168 U. S. 255, 259; *Meredith v. Smith* (C. C. A. 9),

145 F. 2d 620; *Ryan v. Lee* (E. D. Mo.), 10 Fed. 917, 918; *Wells v. Universal Pictures Co.* (C. C. A. 2), 166 F. 2d 690, 691; *Lion Mfg. Co. v. Chicago Flexible Shaft Co.* (C. C. A. 7), 106 F. 2d 930, 932, 933; *Scribner v. Straus*, 210 U. S. 352, 354, 355; *Becher v. Contoure Laboratories*, 279 U. S. 388, 391; *American Well Works v. Layne*, 241 U. S. 257, 259, 260].

Similarly, suits which have for their primary objective the determination of title to a patent or copyright are outside the jurisdiction of the federal court. Such questions, like those above referred to, involve questions of the application of state law which is not affected by the fact that the subject-matter of the suit is a property right created by federal statute rather than by common law, equity or state statute. The origin of the property is of no significance in determining jurisdiction to try cases involving rights in that property. [*Luckett v. Delpark*, 270 U. S. 496, 504, 511; *Laning v. Natl. Ribbon & Carbon Paper Mfg. Co.* (C. C. A. 7), 125 F. 2d 565, 566-567; *Hold Stitch Fabric Mach. Co. v. May Hosiery Mills*, 184 Tenn. 19, 195 S. W. 2d 18, 21, and cases cited therein.]

It is abundantly clear from the foregoing decisions that unless the validity or infringement of the copyright or patent is directly and primarily called into question, no federal jurisdiction arises under Section 1338(a), notwithstanding that in each of these cases, control and ownership of the copyright or patent or of interests therein was the ultimate objective of the litigants. [See also, *Parissi v. General Electric Co.* (N. D. N. Y.), 97 Fed. Supp. 333.] As the United States Supreme Court held in respect to an analogous situation, "Federal jurisdiction may be invoked to vindicate a right or privilege

claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. . . . The case is analogous to those involving rights to land granted under laws or treaties of the United States. Where the complaint shows only that such was the source of the plaintiff's title, the case is not one within the jurisdiction of the federal courts." [*Puerto Rico v. Russell & Company*, 288 U. S. 476, 483-484 (per Stone, J.); *Gully v. First National Bank*, 299 U. S. 109, 112-113, 114, 118; *Barnhart v. Western Maryland Ry. Co.* (C. C. A. 4), 128 F. 2d 709, 713-714; *Schatte v. I. A. T. S. E.* (S. D. Cal.), 70 Fed. Supp. 1008, 1011.] Clearly, therefore, there must be something more than the mere fact that the existence of a copyright is at the heart of the action to justify the assumption of jurisdiction by a district court.

B. A Suit to Foreclose a Mortgage Does Not Present a Federal Question. Nor Is One Created by Reason of the Fact That the Property Mortgaged Is a Copyright.

We have noted that suits respecting the enforcement of contracts relating to patents and copyrights and suits respecting the determination and transfer of title thereto are within the exclusive cognizance of the state courts, absent diversity of citizenship. There appears to be scant justification for the application of a different rule to a chattel mortgage, which is simply a specialized form of contract [*Calif. Civil Code*, Section 2920], or to an action seeking foreclosure thereof, which is simply a means of effecting a determination and transfer of title to the mortgaged property. The right of which enforcement is sought, and the means of its enforcement, are governed

by applicable provisions of state law. Questions of form, validity, acknowledgment, foreclosure, and sale under a decree therefor, are matters clearly within the province of state statutes. Certainly a state court would be the competent, proper and exclusive forum for a suit between citizens of that state to foreclose a chattel mortgage upon household furniture or growing crops, or any other items of personal property. Why is it ousted of jurisdiction to enforce the laws of the state by the fortuitous circumstance that the mortgaged property is a patent or copyright, rather than a house full of furniture?

Case authority upon so obvious a point is not totally wanting. In *Keiper v. Amico*, 174 Misc. 211, 20 N. Y. S. 2d 480, 481, an action to foreclose a chattel mortgage upon a patent, the court stated [*italics ours*]:

“The contention that the federal courts have exclusive jurisdiction of the action on the ground that it involves a patent is untenable. This is an action to foreclose a mortgage on a patent and does not involve its validity. Both parties here concede that the patent is valid, and *the action arises under the mortgage and not under the federal patent law.*”

It has been suggested by appellee that the *Keiper* case does not constitute a determination of want of jurisdiction in the federal court, but is merely a decision that state courts have jurisdiction *concurrent* with that of the United States District Courts. This argument cannot be sustained. If the federal courts have jurisdiction at all, they must acquire it under Section 1338(a) and it is there provided that such jurisdiction shall be *exclusive*. Conversely, if the state court has *any* jurisdiction, the case is not one under Section 1338(a) and the federal court therefore has *no* jurisdiction.

Although the *Keiper* case is the only one dealing directly with the matter at issue in the present case, the federal courts have reached the same result in cases which cannot be substantially distinguished from the present case. In *Dorf v. Denton* (S. D. N. Y.), 17 Fed. Supp. 531, 533, the court held that a state court decision that the execution of a chattel mortgage on a copyright was in fraud of creditors was *res judicata*, stating that the state court had exclusive jurisdiction to determine the validity of such a mortgage. In *Wilson v. Sandford*, 51 U. S. (10 How.) 99, 101-102, the United States Supreme Court, in a case in which a patentee had sold his patent in exchange for promissory notes carrying a provision for forfeiture of the patent in the event of non-payment of the notes, held that the federal court had no jurisdiction of an action to compel such a forfeiture. The rule of the *Wilson* case was approved and applied in *Luckett v. Delpark*, 270 U. S. 496, 504, 511, in which case plaintiff had sued in federal court to compel a re-assignment to him of a patent under the terms of the initial assignment by which he retained a reversionary interest upon failure of stated conditions subsequent. The Supreme Court held that the federal court had no jurisdiction, stating that there, *as in all actions to foreclose rights in a patent or copyright*, the action arose under the contract providing therefor and not under patent or copyright law.

A similar situation that in legal purport and effect cannot be distinguished from that presented by this appeal has frequently arisen in the United States Supreme Court with respect to ship mortgages. By express provisions of both the United States Constitution and Act of Congress, the federal courts are given original and exclusive

jurisdiction of all cases in admiralty. [*U. S. Const.*, Art. III, Section 2; Title 28. *United States Code*, Section 1333.] Concededly, the admiralty jurisdiction of the United States District Courts is at least as broad and inclusive as that conferred by Section 1338(a). If appellee's contentions and the decision of the trial court herein are sound, it would follow by necessary analogy that a district court sitting in admiralty would have exclusive jurisdiction of a libel to foreclose a mortgage on a ship. *Such, however, is most emphatically not the case.* In point of fact, in innumerable decisions prior to 1920, the federal courts have uniformly held that a libel in admiralty to foreclose a ship mortgage presented no action of which a federal court might take jurisdiction! [*Detroit Trust Co. v. Steamer Thomas Barlum*, 293 U. S. 21, 32 and cases cited therein; *The J. E. Rumbell*, 148 U. S. 1, 15; *Bogart v. The Steamboat John Jay*, 58 U. S. (17 How.) 399, 401-402.]

The reasons assigned by the court for so holding are significantly similar to those given in the decisions heretofore cited [Point II. *A supra*] for the proposition that actions involving contracts or assignments of copyrights and patents are not matters of federal jurisdiction, viz., that the subject matter of the suit was not the ship or its operation which were subjects of admiralty jurisdiction, but rather the mortgage which was not, and federal jurisdiction was not created by reason of the fortuitous circumstance that the ultimate result of the suit would be the transfer of possession and/or ownership of the vessel. As the court succinctly stated in *Bogart v. The Steamboat John Jay. supra*, 58 U. S. at 401-402:

“ . . . whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a

chattel personal, whether he is the legal or the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, the decision of these questions belongs to other courts; they are not within the jurisdiction or province of the courts of admiralty."

Since such questions may not be decided by a federal court in the exercise of its jurisdiction in admiralty, in the absence of a specific enabling statute, there appears scant justification for holding that the same questions may be so decided by the court in the exercise of its copyright or patent jurisdiction.

The need for such an enabling statute was recognized by Congress in the enactment of the Ship Mortgage Act of 1920, an elaborate and detailed statute prescribing the only conditions under which the federal courts might obtain jurisdiction of an action to foreclose a ship mortgage.² [See *Detroit Trust Co. v. Steamer Thomas Barlum*, *supra*, 293 U. S. at 32-37.] There is no question of the power of Congress to confer jurisdiction on the federal courts in the foreclosure of a copyright mortgage, just as it did with respect to ships in the Ship Mortgage Act of 1920. Its failure to do so in no wise justifies the courts in acting in its stead.

²It is likewise significant that a ship mortgage which fails in any particular to conform to the provisions of the statute, although otherwise perfectly valid, does not come within the grant of federal jurisdiction and must be foreclosed in the state court. [*Detroit Trust Co. v. Steamer Thomas Barlum*, *supra*, 293 U. S. at 33; *The Emma Giles* (D. C. Md.), 15 Fed. Supp. 502, 508.] In the latter case the court stated that it "reluctantly" reached the conclusion that it lacked jurisdiction since Congress had failed to make the Act wholly effective, but that it could not supply the deficiency by judicial "interpretation," and that it could not "thereby create for itself a jurisdiction which does not otherwise exist." [*The Emma Giles*, *supra*, at page 508.]

C. No Act of Congress Makes an Action to Foreclose a Mortgage on a Copyright a Subject of Federal Jurisdiction.

From the discussion hereinabove set forth, it cannot be disputed that, in the absence of some provision of the copyright statute or Judicial Code expressly making mortgages of copyrights a subject of federal jurisdiction, that jurisdiction does not exist. The trial court, however, purports to find such a statute in Title 17, *United States Code*, Section 28, which provides:

“Copyright secured under this title or previous copyright laws of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will.”

It is argued that by reason of this statute the right to mortgage a copyright is a federal right existing only by virtue of federal statute, and therefore that an action to enforce that right arises under an Act of Congress relating to copyrights within the meaning of Section 1338(a). [97 Fed. Supp. at 364.]

This ruling is erroneous. A mere comparison of the provisions of Section 28 with those of the Ship Mortgage Act of 1920 [Point II, B, *supra*] demonstrates that the intention of Congress was not to create a federal “right to mortgage the copyright” [97 Fed. Supp. at 364], but was simply to permit the mortgaging of a copyright, just as, in the same sentence, it permitted the assignment, grant or bequest of a copyright. It is well settled that “a suit . . . does not arise under an Act of Congress or the Constitution of the United States because prohibited thereby. . . . *With no greater reason can it be said*

to arise thereunder because permitted thereby." [Cardozo, J., in *Gully v. First National Bank*, 229 U. S. 109, 116. Italics ours.]

The provisions of Section 28 are merely permissive, not definitive; they make no provision for the enforcement of such mortgages, nor for their foreclosure or sale of the mortgaged property, nor do they prescribe the requisites of form and validity. The same provision permits *in exactly the same terms and context* the assignment, grant, and bequest of copyrights, yet it has been expressly and uniformly held that assignment, grant and bequest are not federal rights the enforcement of which can be the subject of federal jurisdiction. [See cases cited, Point II, A, *supra*.] There is no justification for the singular holding that the specification of mortgages in common with bequests, grants and assignments in Section 28, makes that right alone, but none of the others, one cognizable in the federal courts.³

The decisions prior to 1920 with respect to ship mortgages likewise present controlling precedent adverse to the holding of the trial court that Section 28 makes the

³It is intimated by the trial court that the statute is more than merely permissive, that it actually creates a right not theretofore in existence, and that the mortgaging of a copyright is therefore a federal right. It will be noted, however, that chattel mortgages were recognized at common law and exist *except as limited* by statute. At common law, the owner of literary property had all rights therein, including the right to mortgage his interest, as those possessed by the owner of any other personal property. [Ball, *Law of Copyright and Literary Property*, sec. 216, p. 474; 18 C. J. S., *Copyright and Literary Property*, sec. 4, p. 140.]

Secondly, in the companion field of patent law, without the benefit of a statute such as Section 28, chattel mortgages of patents have repeatedly been upheld by the courts. Why should it be deemed necessary to create chattel mortgages as applied to copyrights but not as applied to patents?

right to mortgage a copyright a subject of federal jurisdiction. In *The J. E. Rumbell*, 148 U. S. 1, 15-16, the appellees relied in support of their claim of federal jurisdiction upon a federal statute [Act of July 29, 1850, ch. 27, sec. 1, Rev. Stat., sec. 4192] which provided that a mortgage or hypothecation of a vessel or any part thereof, to be valid as against third parties, must be recorded in the office of the collector of customs where such vessel was registered and enrolled. It was argued, much as it is here argued, that that statute made a mortgage recorded thereunder a subject of federal cognizance and a libel to foreclose such a mortgage an action within the admiralty jurisdiction of the federal court. The court, however, held that the statute was merely a permissive registry or recordation provision, that it did not create a right to mortgage, which right existed independent of federal law, and that federal jurisdiction was not created thereby. Manifestly if, as the Supreme Court held, that statute did not bring the mortgages it covered within the cognizance of the federal courts, neither does Section 28.

The foreclosure action which is the subject of this case involved no question of the validity or infringement of the copyright, or of the application of a federal statute, nor did it present any dispute with reference to any alleged federal right. The only questions which might have been presented—such as the rights of sale or redemption, form and validity, or rights of possession—were questions whose decision is not prescribed by any federal statute, but must be made with reference to applicable state law. There is consequently no basis for a decision that the foreclosure action presented a federal question within the meaning of Section 1331 or Section 1338(a).

III.

Even if the Claimed Inadequacy or Deficiency of the Remedy Available in the State Courts May Be Relied Upon to Read Into Section 1338(a) the Implication of Federal Jurisdiction, No Such inadequacy or Deficiency Is Inherent in the Foreclosure Decree of a State Court.

The opinion of the trial court under the heading "The Inadequacy of State Remedies" attempts to support the jurisdiction of the District Court in the foreclosure action by what it conceives to be the deficiencies in the state court process for such foreclosure. [97 Fed. Supp. at 367-369.] The asserted deficiencies are apparently two in number:

1. An action to foreclose a mortgage is an action *in rem*, the *res* being the copyright. But since the *res* does not have a *situs* in any particular state, no state court has the power to deal with and determine rights therein.
2. The decree of the state court, for reasons outlined above, could not transfer merchantable title to the copyright co-extensive with the territorial limits of the United States.

We have already seen that federal jurisdiction in a given case must be affirmatively established upon the strength of the statutory provision that assertedly creates it, not won by default upon the claimed weakness of the state court remedy or process. The asserted need may well be considered by *Congress* in the creation of jurisdiction by *statute*; neither such need nor any other factor justifies a *court* in creating jurisdiction by "*interpretation*" where such jurisdiction is not clearly conferred by

the statute under construction. "*The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation.*" [*American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 95 L. Ed. Adv. Op. 473, 480; *The Emma Giles* (D. C. Md.), 15 Fed. Supp. 502, 508. Italics ours.]

Moreover, the argument is defective in that it proves too much. If, as the trial court has held, personal service upon all parties within the state is insufficient to confer jurisdiction upon the state court, then federal jurisdiction is similarly lacking for precisely the same reason. If, as the trial court has held, the copyright has no "*situs*" within the state, *then it is just as true that it has no "situs" within a district in that state so as to confer jurisdiction on a federal court sitting in that district!* If "*situs*" is a *sine qua non* to jurisdiction in the present case, then the requirement is a double-edged sword which cuts as deeply into the jurisdiction of the federal courts as it does into the jurisdiction of the courts of the states. A *res* that is not present within the boundaries of the state is *a fortiori* not present within the boundaries of a district within the state.

Nor is the trial court's hypothesis to be salvaged by any suggestion that "*situs*" is a requirement of state, but not of federal, jurisdiction. In point of fact, the "*situs*" of an intangible is material, if at all, *only* under the federal statutes. In cases in which personal service is insufficient to confer jurisdiction (and we accept, for purpose of this discussion only, the trial court's assumption that this is such a case), the federal courts have *only* such jurisdiction as is conferred upon them by Title 28, *United States Code*, Section 1655. [*McDowell v. Davies* (E. D. Wash.), 96 Fed. Supp. 301, 302; 3 *Moore's Federal*

Practice, Sec. 64.03, p. 3311.] Presumably, since the trial court treats the foreclosure action as one *in rem* in which personal service alone does not confer jurisdiction, that jurisdiction is conferred by Section 1655. But a federal court has jurisdiction under Section 1655 *only* when the subject-matter of the litigation is “real or personal property within the district” in which that court sits. *Since, ex hypothesi, the copyright is not within the State of California so as to give the state court jurisdiction, it necessarily and inevitably follows that it is not within the Southern District of California so as to confer jurisdiction upon the federal courts of that district!* The federal courts consequently have expressly so held in cases involving the determination of rights in patents. [*Kohagen v. Harwood* (C. C. A. 7), 185 F. 2d 276, 278; *Standard Gas Power Co. v. Standard Gas Power Co.* (N. D. Ga.), 224 Fed. 990, 992.]

Manifestly, under the trial court’s assumption that “*situs*” of a copyright is essential to jurisdiction over it and that a copyright has no “*situs*” within the territorial limits of any state, jurisdiction over it exists in *neither* the federal *nor* the state courts; in fact, it does not exist at all. Consequently, one of the two elements of that assumption is necessarily erroneous. Either the “*situs*” of a copyright is irrelevant and personal service within the jurisdiction is sufficient to confer power to act, or a copyright *does* have a territorial “*situs*” and the courts of the jurisdiction within which that “*situs*” exists have the power to act. If “*situs*” is irrelevant, then personal service confers jurisdiction upon the courts of the state in which personal service is made. If “*situs*” is relevant and the copyright has a territorial “*situs*” somewhere, then the courts of the state in which that “*situs*” exists

have jurisdiction to determine rights in the copyright. In either case, the trial court's hypothesis fails completely to establish, but rather negatives, the conclusion that this action is one of which the state courts do not have jurisdiction.

In point of fact, however, "*situs*" of a copyright does not exist and the concept is totally irrelevant to the jurisdiction of a state court to determine rights in that copyright.

The very real problems of jurisdiction cannot be solved, nor can their solution in any manner be aided by recitation of the outmoded and discredited concept that intangible personal property may be said to have or not to have a "*situs*" within the territorial limits of a particular state. The fiction of "*situs*" of intangibles as a jurisdictional concept has not survived the decision of the United States Supreme Court in *Curry v. McCanless*, 307 U. S. 357, and it no longer has any relevance with respect to the determination whether a particular state has jurisdiction to act upon rights in intangibles. [See *Graves v. Elliott*, 307 U. S. 383, 386; *Estate of Newton*, 35 Cal. 2d 830, 841-842, 221 P. 2d 952, 958-959, and cases cited therein.] The controlling element in the jurisdiction of a state court over an intangible is not the "*situs*" thereof, since it has none, but the amenability to service of persons having interests therein. [*Standard Oil Co. v. New Jersey*, 341 U. S., 95 L. Ed. Adv. Op. 755, 762.] Intangible personal property has no "*situs*."

" . . . intangibles . . . are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them

cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. . . . Obviously, as sources of actual or potential wealth . . . they cannot be disassociated from the persons from whose relationships they are derived.” [Stone, C. J., in *Curry v. McCanless*, 307 U. S. 357, 365-366.]

Concededly, the courts of the State of California would have personal jurisdiction over the only parties from whose relationships the rights sought to be asserted herein are derived. Both mortgagee and mortgagor in the foreclosure action were citizens of California, amenable to process within the state. A state court decree would be completely effective to transfer title of the property involved from one to the other, without any reference to “*situs*” or the lack thereof.

In this respect, this appeal is controlled by the recent (May 28, 1951) decision of the United States Supreme Court in *Standard Oil Co. v. New Jersey*, 341 U. S., 95 L. Ed. Adv. Op. 755. In that case, the State of New Jersey sought to escheat to itself uncollected dividends and shares of stock of appellant corporation. Appellant asserted that the judgment of escheat rendered by the New Jersey State court violated the due process clause of the Fourteenth Amendment in that the court had no jurisdiction of the action for the reason that the escheated intangibles had no “*situs*” within the territorial limits of New Jersey. The court, in language particularly applicable to this appeal, rejected that contention and held that personal service upon appellant was sufficient to give the state court jurisdiction to escheat the intangibles, ir-

respective of any problems of “*situs*,” stating [95 L. Ed. Adv. Op. at 762-763; italics ours]:

“We see no reason to doubt that where the debtor and creditor are within the jurisdiction of a court, that court has constitutional power to deal with the debt. Since choses in action have no spatial or tangible existence, control over them can ‘only arise from control or power over the persons whose relationships are the source of the rights and obligations’ . . . *Situs of an intangible is fictional but control over parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible.* Since such power exists through the state’s jurisdiction of the parties whose dealings have created the chose in action, we need not rely on the concept that the asset represented by the certificate or dividend is where the obligor is found. The rights of the owner of the stock and dividends come within the reach of the court by the notice, *i. e.*, service by publication; the rights of the appellant by personal service. . . . This gives New Jersey jurisdiction to act.”

The above-cited case also fully and completely refutes the conclusion of the trial court that, if the mortgagee were limited to a state court decree of foreclosure and sale, it “would be deprived of the opportunity of having an adjudication which would determine, for all time, and for all jurisdictions, the rights to the property.” [97 Fed. Supp. at 369.]

Such a ruling cannot be supported. It completely ignores and fails to give any effect whatever to the provisions of the Full Faith and Credit Clause of the United States Constitution, which gives such state court decree binding and conclusive effect in all jurisdictions for all purposes. It was similarly contended in the *Standard Oil Co.* case that the New Jersey court lacked jurisdiction to escheat intangibles for the reason that the decision would not finally determine all rights therein which might be asserted in the courts of other jurisdictions. The court rejected that contention, stating specifically that the New Jersey decree was by reason of the Full Faith and Credit clause binding upon the courts of all other jurisdictions and barred any further action in any other jurisdiction with respect to the ownership of the same intangibles. [*Standard Oil Co. v. New Jersey*, 95 L. Ed. Adv. Op. at 764; *Harris v. Balk*, 198 U. S. 215, 226.]

By the same reasoning it is clear that, a state court having acquired jurisdiction to deal with the mortgaged property by virtue of personal service of mortgagor and mortgagee and having entered a decree of foreclosure and sale of the mortgaged property, ordering the mortgagor to deliver said property for such sale, that decree would be valid and effective for all purposes throughout the United States. The decree would be beyond any doubt a conclusive "adjudication which would determine, for all time, and for all jurisdictions, the rights to the property." [97 Fed. Supp. at 369.]

Conclusion.

The solution of the problem presented by this appeal is not aided by consideration of the technical niceties of copyright law or by abstract reflection on the nature of the copyright. The issue is one of mortgages and jurisdiction, not of copyrights, and it is useless to proceed upon any other assumption. A mortgage is sought to be foreclosed as between citizens of the same state, all within the jurisdiction and amenable to the process of the state court. The fact that the mortgaged property is a copyright, rather than an automobile or a kitchen stove, is a purely fortuitous, almost totally irrelevant, circumstance. The abstract nature of a copyright is no more material to this inquiry than the abstract nature of a kitchen stove. The solution of the problem rests upon the interpretation of a concrete federal statute in the light of concrete principles of federal jurisdiction. Under that statute and upon those principles, the conclusion is inescapable that the jurisdiction to foreclose the mortgage here in question is vested exclusively in the state courts. For that reason, the judgment should be and, we feel, will be reversed.

Respectfully submitted,

LOEB AND LOEB,
HERMAN F. SELVIN,
SAUL N. RITTENBERG,
HARRY L. GERSHON,

Attorneys for Appellant.

No. 13044

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

REPUBLIC PICTURES CORPORATION,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Appellee.

APPELLEE'S BRIEF.

LOUIS E. SWARTS,

9700 Wilshire Boulevard,
Beverly Hills, California,

Attorney for Appellee.

PACHT, TANNENBAUM & ROSS,
STUART L. KADISON,
Of Counsel.

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REPUBLIC PICTURES CORPORATION,

Appellant,

vs.

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Appellee.

APPELLEE'S BRIEF.

Basis of Jurisdiction.

Jurisdiction of the Court of Appeals is believed to be derived from Title 28, United States Code, Section 1291, the within appeal being taken from a final decision of the United States District Court for the Southern District of California, Central Division.

The complaint in the court below was framed in declaratory relief and was filed on behalf of Appellee on September 7, 1950 [Tr. p. 3]. Appellant filed its answer on October 18, 1950 [Tr. p. 4]. The matter came on for trial on March 30, 1951, and it affirmatively appeared, both from the complaint and from the Findings of Fact made by the United States District Court, that Appellee was and is a national banking association doing business and having a principal place of business in the Southern District of California, and that Appellant was and is a corporation organized and existing under and by virtue of the laws of the State of New York [Tr. p. 9]. It was further found that the amount in contro-

versy exceeded the sum of Three Thousand Dollars (\$3,000.00), exclusive of costs and interest [Tr. p. 9]. Jurisdiction of the United States District Court, therefore, was derived from Title 28, United States Code, Section 1332(a)(1).

The judgment of the United States District Court was entered on June 14, 1951 [Tr. p. 10, Ex. B], and notice of appeal from said judgment was filed and served by Appellant on June 19, 1951 [Tr. p. 10, Ex. C].

Summary of the Argument.

I.

The United States District Court has comprehensive and exclusive jurisdiction, derived clearly and expressly from a specific statute to hear and decide cases arising under the Copyright Law.

II.

An action to foreclose a mortgage on copyright is an action arising under the Copyright Law and is cognizable exclusively in the United States District Court:

- (a) A civil action arises under a law of Congress when it requires the establishment, enforcement or vindication of a federal right as its principal issue;
- (b) A civil action arises under Section 1338(a) of the Judicial Code if it sets up some right, title or interest under the Copyright Law and invokes a federal right or remedy.

III.

Appellant's cases distinguished:

- (a) Cases cited under Appellant's point I.
- (b) Cases cited under Appellant's point II.
- (c) Cases cited under Appellant's point III.

ARGUMENT.

I.

The United States District Court Has Comprehensive and Exclusive Jurisdiction, Derived Clearly and Expressly From a Specific Statute, to Hear and Decide Cases Arising Under the Copyright Law.

Congressional authority to legislate in the field of copyright is derived from constitutional mandate (Constitution, Art. I, Sec. 8), and pursuant thereto Congress has from time to time enacted legislation establishing and governing copyright, including the present Copyright Law (Act of March 4, 1909, 35 Stat. 1084, Ch. 320; codified and enacted into positive law, Act of July 30, 1947, 61 Stat. 652, Ch. 391, Sec. 1, Title 17, U. S. C.).

Original jurisdiction of *any* civil action arising under the Copyright Law is vested in the United States District Courts under the specific terms of Title 28, United States Code, Section 1338(a), which reads as follows:

“§1338. Patents, copyrights, trade-marks, and unfair competition.

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.”

Within the field of copyright, to which the foregoing specific statute expressly relates, the jurisdiction of the United States District Courts is not limited, but is exclusive and comprehensive.

None of the cases cited by Appellant to the effect that the federal courts are courts of limited jurisdiction, with

which proposition Appellee does not take issue, express or imply the principle that this Court is prevented from *construing* the Judicial Code and the Copyright Law to determine whether or not an action to foreclose a mortgage on copyright is an action coming within their terms.

Neither *Credit Bureau of San Diego v. Petrasich*, 97 F. 2d 65, 67 (C. C. A. 9, 1938), nor *People ex rel. McColgan v. Bruce*, 129 F. 2d 421, 423 (C. C. A. 9, 1942), nor, indeed, any of the cases cited by Appellant deprive the Court of the power or relieve it of the duty of construing Section 1338(a) of the Judicial Code. Indeed, in *People v. Bruce, supra*, the jurisdictional issue was resolved by a construction of Title 28, United States Code, Section 226, in the light of the congressional intent manifested in the enactment of the legislation.

It is, of course, well established that the jurisdiction of the federal courts is limited to the exercise of the jurisdiction conferred upon them by Act of Congress within its constitutional powers, but after Congress has legislated and by constitutional authority extended the powers of the federal court over *any* action arising in a specified field (as here) it is the jurisdiction of the state courts upon which the limitation is imposed or, as here, excluded.

We do not suggest that the Court is called upon to expand Section 1338(a) by judicial interpretation, a practice condemned in *American Fire and Casualty Co. v. Finn*, 341 U. S. 6, 95 L. Ed., Adv. Ops. 473, 480 (1951), nor do we contend that jurisdiction should be invoked *sua sponte*, because of an assumed hiatus in the law. Congress has not failed to act, and all that is required is a construction of the law which Congress has enacted.

That this is nothing novel in the law is demonstrated by the fact that nowhere has it been contended, for ex-

ample, that an action for infringement of copyright should be brought in any court other than the United States District Court. Such an action is cognizable only in the United States District Courts, *despite the fact that Section 1338(a) of the Judicial Code, upon which jurisdiction is grounded in such cases, as well as in the present case, makes no more specific mention of actions for infringement of copyright than of actions to foreclose mortgages on copyright.*

II.

An Action to Foreclose a Mortgage on Copyright Is an Action Arising Under the Copyright Law and Is Cognizable Exclusively in the United States District Court.

The United States District Courts, having exclusive jurisdiction of any civil action arising under the Copyright Law [Title 28, U. S. C., Sec. 1338(a)], there remains for consideration a definition of the characteristics of an action arising under the Copyright Law. To this end we must consider, (a) the characteristics of an action arising under a given federal statute, and (b) the characteristics of an action to foreclose a mortgage on copyright.

(a) A Civil Action Arises Under a Law of Congress When It Requires the Establishment, Enforcement, or Vindication of a Federal Right as Its Principal Issue.

While the problem of jurisdiction as related to copyrights is one of first impression in the courts, much consideration has been devoted to the establishment of general criteria whereunder it can be determined whether an action arises under a given law of Congress. Unfor-

unately for our purposes, these cases have been devoted principally to the construction of Section 1331 of the Judicial Code, which provides for jurisdiction in the federal courts of actions involving a minimal amount and arising under the Constitution, treaties, and laws of the United States and with respect to which it is generally held that in order for a case to arise thereunder it must principally involve the construction, validity, vindication, or effect of the Constitution, treaties, or laws of the United States.

If the tests applicable to Section 1331 were to be determinative of all such questions of jurisdiction, there would have been no purpose in enacting Section 1338(a) to cover the field of patents and copyrights. When, however, jurisdiction is rested on Section 1338(a), or one of the former statutes to the same effect, the foregoing test of construction is but one of the tests, and the lesser one, determinative of the issue. [Pratt v. Paris Gaslight & Coke Co., 168 U. S. 255, 259, 42 L. Ed. 458, 460 (1897); Henry v. A. B. Dick Co., 224 U. S. 1, 56 L. Ed. 645, 651 (1911).]

In *Pratt v. Paris Gaslight & Coke Co.*, *supra* at page 259 of the official report, Mr. Justice Brown stated the law to be as follows:

“The action under consideration is not one arising under the patent-right laws of the United States in any proper sense of the term. *To constitute such a cause the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction, of these laws. Starin v. New York*, 115 U. S. 248 [29:388]; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473 [30:461].” (Emphasis added.)

While, as it will be made to appear, a construction of the Copyright Law is an essential to the instant case, the claim of jurisdiction is not rested solely upon that ground.

The general limits of federal jurisdiction are set by two relatively recent decisions of the Supreme Court of the United States, which may be analyzed with profit.

The first of these is the opinion of Mr. Justice Stone in *Puerto Rico v. Russell & Co.*, 288 U. S. 476, 483, 77 L. Ed. 903, 909 (1933). In that case no right, title or interest under a law of Congress was set up, Mr. Justice Stone stating:

“Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff’s right to sue is derived from federal law, or because the property involved was obtained under federal statute. *The federal nature of the right to be established is decisive*—not the source of the authority to establish it.” (Emphasis added.)

Determinative, then, in an action of this character, is the nature of the right to be established or vindicated. If the right is federal in nature, there is federal jurisdiction; if the right is non-federal in nature, then the mere fact that it is claimed under an act of Congress does not vest jurisdiction in the United States District Courts.

Nor does the case of *Gully v. First National Bank*, 299 U. S. 109, 112, 81 L. Ed. 70, 72 (1936), militate against this test. In that case the propriety of removal to a federal court of an action instituted by a state taxing authority against a national bank was challenged, the Supreme Court holding that there was no federal juris-

diction, notwithstanding that the source of the authority to establish the right was derived from a permissive federal statute. This is entirely consistent with *Puerto Rico v. Russell & Co.*, *supra*, and with *Pratt v. Paris Gaslight & Coke Co.*, *supra*.

In *Gully v. First National Bank*, *supra*, at page 116 of the official report, Mr. Justice Cardozo stated:

“Here the right to be established is one created by the state. If that is so, it is unimportant that Federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. . . . With no greater reason can it be said to arise thereunder because permitted thereby.”

It is manifest, therefore, that the right, title or interest to be established, enforced or vindicated in the *Gully* case was by its nature a state, as opposed to a federal, right, and by definition cognizable in the state courts and not in the United States District Courts.

Some attention should be given to the cases relied upon by Appellant, and it is suggested that these should be examined in the light of the following language of Mr. Justice Cardozo in the case of *Gully v. First National Bank*, *supra*, cited and relied upon by Appellant herein. The pertinent quotation is found at pages 117-118 of the official report:

“This Court has had occasion to point out how futile is the attempt to define a ‘cause of action’ without reference to the context . . . To define

broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. . . . Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, *the courts have formulated the distinction between controversies that are basic and those that are collateral*, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by." (Emphasis added.)

In the cases cited under headnote II-A of Appellant's brief, the facts upon which the principles announced were predicated bear no resemblance to the facts in the case at bar. Appellant lists a number of cases, all of which are disposed of by the courts on the primary ground that no federal jurisdiction was involved because the actions were *in personam* and only incidentally involved questions under federal laws, the primary questions in each case being the rights of individuals before the court to remedies well known to the common law, or stated otherwise, to remedies non-federal in nature and principally evolved from contracts *inter partes*. These cases will be discussed and distinguished under Appellee's Point III, *infra*.

(b) A Civil Action Arises Under Section 1338(a) of the Judicial Code if It Sets Up Some Right, Title or Interest Under the Copyright Law and Invokes a Federal Right or Remedy.

Historically, copyright, that is, the right of an author to his published work, has existed solely under statute in English-speaking countries since the Act of 8 Anne (1709). (*Donaldson v. Beckett*, 4 Burr. 2408 [1774]; *Wheaton v. Peters*, 8 Peters 591, 33 U. S. 591 [1834]; *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339 [1908].)

At the present time copyright in the United States exists solely under and pursuant to the Act of 1909, codified and enacted into positive law by Act of Congress July 30, 1947, Title 17, U. S. C., 61 Stat. 652.

In *Bobbs-Merrill Co. v. Straus*, *supra*, at page 346, the court stated:

“ . . . Copyright property under the Federal law is wholly statutory and depends upon the right created under the acts of Congress passed in pursuance of the authority conferred under Article 1, Section 8, of the Federal Constitution”

There can be no doubt, therefore, that copyright is a right *federal* in nature, unknown to the common law.

The right to mortgage a copyright is likewise federal in nature and unknown to the common law. It is established under Section 28 of the Copyright Law. (Title 17 U. S. C., Sec. 28.)

“Copyright secured under this title or previous copyright laws of the United States may be assigned, granted or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will.”

Absent Section 28, copyright, because of its non-traditional nature as a property concept, could not be made the subject of mortgage. The Circuit Court of the United States for the Second Circuit has stated that "*copyright can be mortgaged only under the Federal Copyright Law.*" (*In re Leslie-Judge Co.*, 272 Fed. 816, 818 (C. C. A. 2, 1921); Cert. Den. in *Green v. Felder*, 256 U. S. 704, 65 L. Ed. 1180 (1921).

Copyright is an intangible of the most elusive nature and is only deemed to be a property right because it has value. In so far as situs can be attributed to so abstract a right, its situs is co-extensive with the jurisdiction of the authority which gives it life, that is the federal government. (*Stevens v. Gladding*, 58 U. S. (17 How.) 448, 451 (1854).)

A mortgage on copyright therefore is a mortgage on an intangible which defies application of the conventional common law requisite of mortgages or the remedies provided by the common law or local statutes.

A copyright can be neither mortgaged, nor a mortgage on copyright recorded under California law (*Cal. Civil Code*, Sec. 2955 (1) and *Cal. Civil Code*, Sec. 2957 (4).)

Civil Code, Section 2955(1) excludes property not capable of manual delivery from hypothecation by mortgage and *Civil Code*, Section 2957(4) permits recordation, a requisite to validity, only in the case of mortgages on property having a situs within a given county of the state.

In the case of *Henry v. A. B. Dick Co.*, 224 U. S. 1, 56 L. Ed. 645, 651 (1911), the Supreme Court of the United States stated:

“*The remedy* which the complainant seeks may often determine whether the suit is one arising under the patent law, and cognizable only in a court of the United States, or one upon a contract between the patentee and his assigns or licensees, and therefore cognizable only in a state court, unless there be diversity of citizenship . . .

* * * * *

“The test of jurisdiction is this: Does the complainant ‘set up some right, title, or interest under the patent laws of the United States, *or* make it appear that some right or privilege will be defeated by one construction, or sustained by another, of those laws?’ ” (Citing among others, *Pratt v. Paris Gaslight & Coke Co.*, *supra.*) (Emphasis added.)

The remedy sought in an action to foreclose a mortgage on copyright operates upon the copyright itself in that it requires a sale of the copyright by an officer of the court. It is therefore *in rem*.

We respectfully submit that this remedy is exactly parallel to a situation in which under a writ of execution an officer of the court seeks to seize and sell the copyright to satisfy a judgment.

A long line of cases establishes the proposition beyond peradventure that no execution out of a state court can be directly levied upon a copyright or patent. (*Stevens*

v. Gladding, supra; Stevens v. Cady, 55 U. S. (14 How.) 528 (1852); *Agar v. Murray*, 105 U. S. 126, 130, 26 L. Ed. 942, 943 (1881).)

In *Agar v. Murray, supra*, at page 130 of the official report, Mr. Justice Gray cites and quotes with approval the following language of Mr. Justice Curtis, in *Stevens v. Gladding*:

“There would certainly be great difficulty in assenting to the proposition that patent and copyrights, held under the laws of the United States, are subject to seizure and sale on execution. Not to repeat what is said on this subject in 14 How. 531, it may be added, that these incorporeal rights do not exist in any particular State or District; they are co-extensive with the United States. There is nothing in any Act of Congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of States and Districts. That an execution out of the Court of Common Pleas for the County of Bristol, in the State of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island or New York, will hardly be pretended. That, by the levy of such an execution, the entire right could be divided, and so much of it as might be exercised within the County of Bristol sold, would be a position subject to much difficulty. These are important questions on which we did not find it necessary to express an opinion, because in this case neither the copyright, as such, nor any part of it was attempted to be sold.”

Mr. Justice Gray's interpretation of *Stevens v. Gladding*, was as follows (105 U. S. 130-131):

"The difficulties of which the learned Justice here speaks are of seizing and selling a patent or copyright upon an execution at law, which is ordinarily levied only upon property or the rents and profits of property, that has itself a visible and tangible existence within the jurisdiction of the court and the precinct of the officer; and do not attend decrees of a court of equity, which are *in personam*, and may be enforced in all cases where the person is within its jurisdiction. *Massie v. Watts*, 6 Cranch. 148."

The case of *Stevens v. Gladding*, *supra*, having survived in full vigor the passage of one hundred years has been cited with approval no less than six times by the Supreme Court of the United States, forty times in other Federal courts, and twenty-four times in the state courts, and the case of *Agar v. Murray*, *supra*, approving of *Stevens v. Gladding*, has been cited no less than three times in the Supreme Court, twenty-five times in other federal courts, and thirty times in the state courts. This despite the fact that the subject matter of the two cases is limited to a discussion of this narrow question of jurisdiction.

Appellant can marshal to the contrary only the case of *Kieper v. Amico*, 174 Misc. 211, 20 N. Y. S. 2d 480-481, quoted by appellant on page 12 of its brief, minus the citations, and is the mere statement of the opinion of a law and motion Judge, not supported by reason or authority. He simply states that the action to foreclose a mortgage on a patent, since both parties conceded that the

patent was valid, would arise under the mortgage and not under the patent law. For this bald statement he cites as follows: *Luckett v. Delpark*, 270 U. S. 496, 502, 503; *Globe Steel Abrasive Co. v. National Metal Abrasive Co.*, (C. C. A. 6th, 1939), 101 F. 2d 489; *Waterman v. McKenzie*, 138 U. S. 252; *Wise v. Tube Bending Machine Co.*, 194 N. Y. 272, 87 N. E. 430; *New Era Electric Range Co. v. Ferrell*, 252 N. Y. 107, 169 N. E. 105; *Middlebrook v. Broadbent*, 47 N. Y. 443, 7 Am. Rep. 457; *Hyatt v. Ingalls*, 124 N. Y. 93, 26 N. E. 285. It is to be noted that although the Judge relied on the cases cited, the appellant cites only *Luckett v. Delpark*, *supra*, in support of its own argument. Not one of these cases, even *Luckett v. Delpark*, as we will shortly demonstrate, supports the proposition advanced by the New York Judge. We deem it fair in view of this unjudicial pronouncement to disregard this case as an authority in opposition to the propositions advanced by the appellee. Again in connection with *Kieper v. Amico*, *supra*, the Court's attention is respectfully invited to the following language of Mr. Justice day, in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 346, 52 L. Ed. 1086, 1091 (1907), where he quotes an opinion by Judge Lurton in *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24, as follows:

“There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes, that the cases which relate to the one subject are not altogether controlling as to the other.”

III.

Appellant's Cases Distinguished.

(a) Cases Cited Under Appellant's Point I.

The significance of these cases has been discussed in the opening of this brief, and as therein stated the Appellee has no quarrel with the propositions of law therein advanced. It is suggested that each and every one of these cases relied upon by Appellant is met by the plain language of Title 28, United States Code, Section 1338(a).

(b) Cases Cited Under Appellant's Point II.

Under subdivision "A" of Appellant's point II, Appellant states that a controversy over a contract relating to the licensing, use or assignment of a patent or copyright, or over the title to a patent or copyright, does not arise under patent or copyright laws.

All of the cases cited on page 9 and at the top of page 10 of Appellant's brief are cases which directly hold that *controversies over contracts between individuals, where the construction or enforcement of the contract is the primary issue*, are cases solely within the jurisdiction of state courts, absent diversity of citizenship, and these cases are correctly cited in support of that proposition with which we have no quarrel. However, at the bottom of page 9, Appellant states that "a suit to cause execution" upon a patent or copyright is a matter of state court jurisdiction, citing *Pratt v. Paris Gas Light & Coke Co.*, *supra*, among others. We are at a loss to understand what Appellant means by "a suit to cause execution," but respectfully submit there is nothing in the cases cited, especially in the case of *Pratt v. Paris Gas Light & Coke Co.*, *supra*, which refers to such a proposition. On the contrary, all of

these cases inferentially support Appellee's contention and impinge in no way upon the authority of *Stevens v. Gladding, supra*, to the effect that execution issued out of a state court will not lie against a copyright.

The *rationale* of these cases is found in the language of Mr. Justice Cardozo, in the case of *Gully v. First National Bank, supra*, quoted on pages 8 and 9 of this brief, and particularly the following portion thereof which bears repetition:

"... the courts have formulated the distinction between the controversies that are basic and those that are collateral . . ."

Using this as our yardstick, it is manifest that in all of these cases cited by the Appellant any issue affecting the copyright or patent, or for that matter a law of the United States, as in *Shulthis v. McDougal*, 225 U. S. 561, 569, and *Teague v. Brotherhood of Locomotive Firemen*, 127 F. 2d 53, was purely collateral and the main issue in the cases was the interpretation of a contract or the rights between parties, and the remedy sought was a remedy *in personam* and *not in rem*.

The case of *Becher v. Contoure Laboratories*, 279 U. S. 388, 391-392, 73 L. Ed. 752, 753-754 (1928), which Appellant cites at the top of page 10 of its brief, strongly supports the contention of the Appellee and refutes the argument of the Appellant. The following language of Mr. Justice Holmes, in that case, is illuminating:

"Even if the establishing of Oppenheimer's claim is that Becher's patent is void, that is not the effect of the judgment. Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment *in rem* binds all the world, but the facts

on which it necessarily proceeds are not established against all the world * * * and conversely establishing the facts is not equivalent to a judgment *in rem*. That decrees validating or invalidating patents belong to courts of the United States does not give sacrosanctity to the facts that may be conclusive upon the question in issue."

The foregoing citation disposes of the argument on page 10 of Appellant's brief that suits having for their primary object the determination of title to a patent or copyright are outside the jurisdiction of the federal court. Such suits are only outside the jurisdiction of federal courts when they primarily involve questions of the application of state law and do not involve the giving of a judgment *in rem* against a patent or copyright, as so clearly defined in the opinion of Mr. Justice Holmes, quoted above. (*Becher v. Contour Laboratories, supra.*) In that case the plaintiff sued the defendant for infringement of a patent and asked for an injunction restraining the defendant from proceeding in the state court in an action brought by the defendant, as plaintiff, there to establish that the Becher patent had been obtained by fraud from one Oppenheimer. In the case before Mr. Justice Holmes, Becher claimed that if the defendant's action in the state court were successful it would invalidate his, Becher's, patent, and that in such an action the state court had no jurisdiction. The Supreme Court held that the state court had jurisdiction to try the issue of fraud and establish the fact thereof even though the invalidity of Becher's patent might be a necessary inference therefrom, and Mr. Justice Holmes, writing for the Court, in the language above quoted ruled substantially that the state court could not give a judgment *in rem*, defeating

Becher's patent by giving specific *effect* to the fact which it had jurisdiction to *find*.

Appellant further states, at page 10 of its brief, that the "origin of the property is of no significance in determining jurisdiction to try cases involving rights in that property," and cites, among other cases, *Luckett v. Del-park*, 270 U. S. 496, 504, 511, 70 L. Ed. 703 (1926). This was an action by a patent owner against licensees to recover among other things for royalties and the cancellation of licensing agreements and the reconveyance of a patent and the forfeiture of licenses as to other patents, all on the ground of the breach by the defendant of agreements and the failure of conditions subsequent under a contract between the parties. The plaintiff sought to invoke the jurisdiction of the federal court by seeking an injunction against future patent infringement. Mr. Chief Justice Taft delivered the opinion of the Court, saying:

"We do not think this suit arises under the patent laws. Its main and declared purpose is to enforce the rights of the plaintiff under his contract with defendants for royalties and for pushing sales of 'My Pal' garments. In addition he seeks the reconveyance of one patent on forfeiture for failure of condition to remove a cloud on his title and a cancellation of all agreements of license of the other for their breach in order presumably that unembarrassed by this assignment and licenses, he may enjoin future infringement."

The Court cites with approval the exactly parallel decision of Mr. Chief Justice Taney in *Wilson v. Sanford*, 51 U. S. (10 How.) 99, 100, 13 L. Ed. 344, 345 (1850), holding that the remedy under the patent law could only arise after the purely non-federal questions under the con-

tract had been decided, and these the Court said “depended altogether upon rules and principles of equity.” [Citing *Wilson v. Sanford, supra.*] Nowhere in the case does the Court state or hold that the origin of the property is of no significance in determining jurisdiction which, of course, it is, although it need not be controlling.

We have already discussed the cases cited as stating rules of construction under Section 1338(a) under our Point I, and here again we call attention to the fact that many of the cases involved construe Section 1331 rather than 1338(a), albeit they are not contrary in their holding to the contention of the Appellee herein.

Appellant then proceeds by way of peroration to subdivision A of point II of its brief to state that the decisions discussed above make it “abundantly clear” that “unless the validity or infringement of the copyright or patent is directly and primarily called into question, no federal jurisdiction arises under Section 1338(a), notwithstanding that in each of these cases, control and ownership of the copyright or patent or of interests therein was the ultimate objective of the litigants.” It then cites *Parissi v. General Electric Co.*, 97 Fed. Supp. 333 (N. D. N. Y., 1951), where the Court distinctly held that a case brought for the unjust enrichment of the defendant through the use of plaintiff’s patent should be remanded to the state court because “where rights *depend on principles of common law and equity*, the fact that a patent or copyright is incidentally involved does not give federal jurisdiction.” (Emphasis added.) Obviously it is “abundantly clear” that this case does not sustain Appellant’s contention that unless the validity or infringement of a copyright is involved the case does not arise under Sec-

tion 1338(a), but it does, and all of the cases cited do, sustain the proposition that if the case is primarily an action at common law or within the factual purview of the state courts the fact that ownership of the copyright or patent or interest therein is the ultimate objective of the litigant does not confer jurisdiction on the federal court. We do not take issue with the latter proposition.

Appellant then cites *Puerto Rico v. Russell & Co.*, *supra*, as a decision of the United States Supreme Court held in respect to an "analogous situation." The analogy escapes us. The case of *Puerto Rico v. Russell*, *supra*, as well as the case of *Gully v. First National Bank*, *supra*, and the remaining citations on page 11 of Appellant's brief, have no reference whatever either to patents or copyrights. In the *Puerto Rico* case federal jurisdiction was sought and denied in an action to collect a tax due under a Puerto Rican taxing statute, despite the fact that federal law permitted the bringing of such an action. Obviously the court held that the action was one under the Puerto Rican taxing law and did not invoke the federal statute permitting the action for the collection of a tax levied under it. We take the liberty of repeating the quotation from page 483 of the official report in *Puerto Rico v. Russell & Co.*, also reproduced under our point II(a):

"Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The *federal nature of the right to be established is decisive*—not the source of authority to establish it." (Emphasis added.)

We now come to a consideration of the cases cited by Appellant under its point II B. Appellant assumes to note that “suits respecting the enforcing of contracts relating to patents and copyrights and suits respecting *the determination and transfer of title* thereto are within the exclusive cognizance of the state court, absent diversity of citizenship.” This we respectfully submit does not appear at large or at all from the citations of authority which we have discussed above.

Appellant then poses a rhetorical question asking “why is it [the state court] ousted of jurisdiction to enforce the *laws of the state* by the fortuitous circumstance that the mortgaged property is a patent or copyright rather than a houseful of furniture?” The answer is plain. The houseful of furniture was always subject to mortgage under common law, is a mortgage of tangibles within the limits of the state and to which all the attributes of common law mortgages may be attached, *and there are no state laws with respect to mortgages of copyright to be enforced.* Without invoking Section 1338(a) of the Judicial Code the answer seems sufficient clear.

Kieper v. Amico, supra. next cited by Appellant, is treated exhaustively on page 14 of Appellee’s brief and is, for the reasons there stated, without weight in support of Appellant’s position.

Appellant then quotes the case of *Dorf v. Denton*, 17 Fed. Supp. 531, 533 (D. C. N. Y., 1937), cited by Appellant on page 13 of its brief, which was decided, as stated in the opinion, “under the teachings of *Becher v. Contour Laboratories, supra, . . .*” In that case a creditor of the proprietor of a copyright attempted by sequestration proceedings in the state courts of New York to obtain pos-

session of a copyright as a means of satisfying his claim. The creditor applied for and obtained the appointment of a receiver for the property of the debtor, the copyright proprietor, and then sought through an action by the receiver to set aside an assignment of the copyright and a mortgage on the copyright as in fraud of creditors. The state court, directly contrary to the statement of the case in Appellant's brief, found that there was no fraud in the assignment by the debtor or in the execution of the chattel mortgage. These were findings of fact and *res adjudicata* as to the persons before the court. There is absolutely nothing in the decision to justify Appellant's statement that Judge Woolsey, in the United States District Court, "found that the state court had exclusive jurisdiction to determine the validity of such a mortgage." The action in the District Court was an action brought by the receiver for the infringement of the copyright and Judge Woolsey held the receiver had no standing whatever to maintain the suit because (p. 533) "it has not been shown he is the owner of the copyright on which he seeks to found his action."

Wilson v. Sanford, 51 U. S. (10 How.) 99, 101-102, 13 L. Ed. 344, 345 (1850), and *Luckett v. Delpark*, 270 U. S. 496, 504, 511, 70 L. Ed. 703 (1926), have heretofore been discussed by Appellee, and at this point it is only necessary to point out that neither of these cases are authority for the statement allegedly contained therein (at page 13 of Appellant's brief) and even the facts of the *Wilson* case are inaccurately noted. In the *Wilson* case the patentee had not "sold his patent in exchange for promissory notes carrying a provision for forfeiture of the patent in the event of non-payment of the note." The contract in question in the case of *Wilson v. Sanford*,

supra, was a contract under which the patentee granted a *license* to the use of his patent in exchange for the notes and he sought a forfeiture of the *license*, adding a cause of action for infringement of the patent or for an injunction against its further use, hoping thereby to establish his right to federal jurisdiction. The court simply held there, as it did in *Luckett v. Delpark, supra*, that the plaintiff could not invoke jurisdiction of the federal court, under Section 1338(a), to determine his rights under a contract and that he had no right to proceed under the patent until the licenses were declared to be forfeited by an appropriate state court proceeding.

In the discussion of *Luckett v. Delpark, supra*, Appellant attributes to the Supreme Court a statement, *which that court never made*, to the effect that in all actions to foreclose rights in a patent or copyright the action arises under the contract and not under the patent or Copyright Law. Careful examination of the opinion in *Luckett v. Delpark* discloses no such statement or anything akin thereto.

Appellant seeks comfort in attempting to draw an analogy between the situation at bar and jurisdiction of the federal Court to foreclose ship mortgages. That the analogy is destructive of Appellant's proposition is manifest. The Ship Mortgage Act of 1920 created a right wholly unknown to the law prior to that date, a preferred ship mortgage. Bottomry and Respondentia, older concepts, are as old as the law itself. Naturally, therefore, any action to enforce by way of foreclosure or otherwise a ship mortgage, not obtained under the Act of 1920, is within the cognizance of the state courts. A preferred ship mortgage, obtained under the law of 1920

and unknown to the common law, is precisely identical to a mortgage on copyright obtained under the Act of 1909 *and equally unknown to the common law*. No one, not even Appellant, suggests that an action to foreclose a mortgage under the Act of 1920 belongs in any forum other than the United States District Court. It must follow that in the precisely analogous situation an action to foreclose a mortgage on copyright, obtained under the Act of 1909, is exclusively cognizable in the same court. If *Detroit Trust Co. v. Steamer Thomas Barlum*, 293 U. S. 21, 32, 79 L. Ed. 176, 179 (1934); *The J. E. Rumbell*, 148 U. S. 1, 15, 37 L. Ed. 345, 348 (1892), and the other cases cited by Appellant for this proposition are taken in context, the fallaciousness of Appellant's reasoning becomes clear. In the *Emma Giles*, 15 Fed. Supp. 502 (D. S. Md. 1936), the court made it clear that jurisdiction of actions to foreclose preferred ship mortgages under the Ship Mortgage Act of 1920 were within the exclusive jurisdiction of the United States District Court, but that if a mortgage through failure to observe the provisions of the Act fell short of the novel statutory mortgage, an action to foreclose it was in nowise to be treated differently than actions to foreclose mortgages prior to the enactment of the statute. *What the Ship Mortgage Act of 1920 does for preferred ship mortgages, the Copyright Law of 1909 and Section 1338(a) of the Judicial Code do for mortgages on copyright.*

Under its Point II-C, Appellant suggests that Congress' intention in enacting Section 28 of the Copyright Law was merely to permit the mortgaging of a copyright. It then cites *Gully v. First National Bank*, *supra*, for the proposition that a suit does not arise under an Act of

Congress because permitted thereby. Appellant has closed its eyes to that which it does not wish to see. Mr. Justice Cardozo, in the *Gully* case, was referring to a Federal statute which permitted the states to enact the legislation under which the action was brought. In the case at bar, Section 28 of the Copyright Law, represents the creation by the Congress of the United States of the right whereunder the suit is brought. Even though, by some stretch of the imagination, it might be conceded that Section 28 is permissive only, *the fact remains that mortgages of copyright are permitted nowhere else*. Had Section 28 been enacted to read that *the states* might enact legislation permitting the mortgaging of copyright, Appellant's parallel would be complete and well taken. In *Gully v. First National Bank, supra*, the Federal Act sought to be invoked as the source of Federal jurisdiction specifically permitted the legislatures of the states to enact the legislation under which the litigation arose. *In the case at bar, the legislation out of which the action arises is federal not state*.

Appellant next, by way of footnote on page 17 of its brief, makes the bold statement that at common law chattel mortgages were recognized and that the owner of literary property had the right to mortgage his interest therein. For this proposition it cites *Ball, Law of Copyright and Literary Property*, Sec. 216, p. 474, and 18 C. J. S. *Copyright and Literary Property*, Sec. 4, p. 140.

One looks in vain for any such statement in the treatise to which reference is made, and the statement in *Corpus Juris Secundum* which reads "Where manuscripts have been mortgaged they may be sold on foreclosure," is implemented only by the authority of *Washington Bank v.*

Fidelity Abstract, etc. Co., 15 Wash. 487, 46 Pac. 1036 (1896), which contains the following interesting statement:

“Only one question is brought to the attention of this court, namely, the contention that, on account of the peculiar nature of the property described in the mortgage, the court erred in decreeing its sale. The appellant relies on the case of *Dart v. Woodhouse*, 40 Mich. 299. This case holds that a set of abstract books such as those in suit is but the unpublished manuscript of an author, valuable only on account of its literary contents, and belongs to the class of unleviable property, *such as a patent right or a copyright*, which are held by most of the courts to be unassignable privileges for incorporeal and intangible rights.” (Emphasis added.)

The Washington court then goes on to state that the abstract books themselves, being corporeal, could be made the subject of levy and sale. This is the precise reasoning found in *Stevens v. Cady, supra*, where the corporeal copper plates were separated from the incorporeal right to reproduce them.

Appellant then turns to *The J. E. Rumbell*, 148 U. S. 1, 15, 16, 37 L. Ed. 345 (1892). In that case the Supreme Court stated that mere permissive recordation of a mortgage did not give rise to a federal action and did not make a mortgage on a ship a federal right or a subject of maritime jurisdiction. That this is true there can be no doubt, since the action clearly does not arise under the Recordation Act but under the accepted common law mortgage. However, in the *Rumbell* case the Federal Court retained jurisdiction.

(c) Cases Cited Under Appellant's Point III.

Appellant contends in its Point III that there is no inadequacy or deficiency in the foreclosure decree of a State Court. In order to consider the proposition made by Appellant under its Point III, it is necessary to beg the question as to whether or not a mortgage on a copyright is purely a federal instrumentality, and the remedy sought in its foreclosure purely a federal right under the copyright statute.

The concept of *situs* has no place in Appellee's argument. *Situs* is unimportant except in support of an argument that jurisdiction can be found in the State Courts. It has no place in finding federal jurisdiction, since the jurisdiction of the United States District Courts is co-extensive with the copyright, as established by Section 1338(a) of the Judicial Code. As Appellee has hereinabove demonstrated, the copyright is co-extensive with the boundaries of the United States (*Stevens v. Gladding, supra*; *Agar v. Murray, supra*).

The superficial argument which appears on page 20 of Appellant's brief can be answered by the fact that Appellant confuses jurisdiction with venue. Section 1655 of the Judicial Code deals primarily with venue. Any Federal Court has jurisdiction of an action to foreclose a mortgage on copyright; the venue, according to Section 1400 of the Judicial Code, must be laid in the district where the defendant resides or may be found. Section 1655 is a portion of Part V of Title 28, relating in terms to procedure only.

Further, if we are to accept the contentions of Appellant, made on pages 20 and 21 of its brief, it must follow that Congress has created an unenforceable right to

be sacrificed through a legislative oversight. The answer to this proposition is to be found in *Switchmen's Union of N. A. v. National Mediation Board*, 320 U. S. 297, 300, 88 L. Ed. 61, 64 (1943), wherein Mr. Justice Douglas stated:

“If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks*, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427, and *Virginian R. Co. v. System Federation, R. E. D.* 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the ‘right’ of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose.”

Surely, it was unnecessary for Congress to add to Section 28 of the Copyright Law a provision to the effect that the mortgage may be foreclosed.

In *Kohagen v. Harwood*, 185 F. 2d 276, 278 (C. C. A. 7, 1950), the *res* was not a copyright but merely a royalty, and it was held that not only did the suit not involve a claim to specific property, but that the royalty did not exist in the eastern district of Wisconsin, and that substituted service, therefore, could not be sustained. We are not here concerned with the right to obtain sub-

stituted service against any possible defendant in an action to foreclose a mortgage on copyright, but with the jurisdiction of the court to hear and determine the action.

Appellant closes with the statement that this appeal is controlled by the recent decision of the United States Supreme Court in *Standard Oil Co. v. New Jersey*, 341 U. S., 95 L. Ed. Adv. Op. 755 (1951). The cited case involved the effort of the State of New Jersey to escheat uncollected dividends and shares of stock of the Standard Oil Co. Service by publication was had (95 L. Ed. Adv. Op. 759). The court pointed up the distinction which Appellee has drawn and which was seen by the learned trial Judge in the case at bar, between an action purely *in personam* and an action sounding *in rem*. We are not here concerned with "judicially coerced action."

Appellant cites the well known case of *Curry v. McCannless*, 307 U. S. 357, 83 L. Ed. 1339 (1938), as authority for the statement that the fiction of *situs* of "intangibles" no longer persists in our jurisprudence, and again points to the authority of *Standard Oil Co. v. New Jersey*, *supra*, by stating that the controlling element in the jurisdiction of a state court over an intangible is not the *situs* thereof, since it has none, but the amenability to service of persons having interests therein. At this point in its brief Appellant seems to grasp the position of Appellee, which is that state courts have jurisdiction *in personam* and by judicially coerced action to achieve the collection of a mortgaged debt, without recourse to the federal Court. Or, stated otherwise, that state courts can act *in personam* where copyrights are but collaterally involved. The position of Appellee is that the mortgage

cannot be foreclosed by a state court action *in rem* on the copyright, because the State law does not know or recognize such a mortgage, and because any action directly on the copyright is an action arising under the Copyright Law. This proposition has been recognized for many years and in many cases, and one of the most apt expressions of it is found in the old California case of *Pacific Bank v. Robinson*, 57 Cal. 520, 521 (1881). The argument of prevailing counsel, quoted in the official report, was as follows:

“It is true that under the laws of Congress upon patents no interest in a patent can be legally transferred except by an instrument in writing executed by the patentee. There is nothing in the Federal laws, nor in the laws of this State, that prevents the Court from making the order appealed from; but on the contrary, as we have shown, both the authorities and the statutes decide and prescribe that such an order may be made. The Court *does not* make the transfer, but it *orders* the patentees to execute it.”

Adopting this argument, the court then stated on p. 525:

“There is nothing in the case which involves the power of a State court in equity to compel the assignment of a patent, according to the Act of Congress, for the benefit of judgment creditors of the owner. *Of course the United States Courts have jurisdiction of any questions which arise as to the title itself*; but as the thing itself is not exempted from seizure and sale by the laws of the State, we think upon principle and authority that the order of the Court below was correct.” (Emphasis added.)

Conclusion.

The judgment appealed from should be affirmed with costs to the Appellee.

Respectfully submitted,

LOUIS E. SWARTS,

Attorney for Appellee.

PACHT, TANNENBAUM & ROSS,

STUART L. KADISON,

Of Counsel.

No. 13044

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REPUBLIC PICTURES CORPORATION,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Appellee.

APPELLANT'S REPLY BRIEF.

LOEB and LOEB,
HERMAN F. SELVIN,
SAUL N. RITTENBERG,
HARRY L. GERSHON,

523 West Sixth Street,
Los Angeles 14, California,

Attorneys for Appellant.

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No. 13044

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REPUBLIC PICTURES CORPORATION,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Appellee.

APPELLANT'S REPLY BRIEF.

There is no real dispute here presented as to the legal principles by which this appeal is governed. The jurisdiction of the District Courts in the absence of diversity of citizenship is dependent upon the action being one directly and primarily requiring the construction or application of a federal statute in the absence of which no cause of action could be stated. If the action only incidentally or collaterally involves a federal statute, or simply seeks to assert rights or claims having their origin under such a statute, federal jurisdiction cannot be invoked. These principles control the determination of federal jurisdiction under Section 1338(a) as well as under Section 1331.¹ Appellee tacitly at least, if not expressly, accepts

¹Some suggestion is made [Appellee's Br. p. 6] that the tests of jurisdiction under Section 1331 are not precisely applicable to determination of the same question under Section 1338. Although

our statement of these controlling principles [Appellee's Op. Br. pp. 8-11], *but only as an abstract legal proposition*; in application to the present case, appellee in fact refuses to apply or to be governed by those principles or by their necessary and logical implications.

In justification of its refusal, appellee sets up and purports to apply a syllogism that is demonstrably erroneous in both major and minor premises and in conclusion:

1. An action arises under an Act of Congress relating to copyrights when it is brought to enforce a right claimed under such an act;
2. The right to mortgage a copyright is a "federal right";
3. An action to foreclose a mortgage on a copyright is therefore an action arising under an Act of Congress relating to copyrights.

Nothing said by appellee in support of its self-conceived syllogism in any manner suggests any conclusion other than that the foreclosure action here considered does not present a case for federal jurisdiction under Section 1338(a).

no reasons are given for that suggestion, it is intimated that the tests must be different, else "there would have been no purpose in enacting Section 1338(a) to cover the field of patents and copyrights."

The purpose of separately specifying patents and copyrights in Section 1338(a) was not, as appellee suggests, to require a test different from that under Section 1331, but rather to make such federal jurisdiction exclusive in patent and copyright cases, and to dispense with the "amount in controversy" requirement. [*Advertisers Exchange, Inc. v. Bayless Drug Store, Inc.* (D. C. N. J.), 3 F. R. D. 178.] The tests of jurisdiction under the two statutes are identical.

ARGUMENT.

I.

An Action Does Not Arise Under the Copyright Laws Merely Because It Seeks to Enforce a Right Which Has Its Origin in Those Laws or an Obligation Created in the Exercise of Such a Right.

Appellee's position, briefly stated as a general proposition, is simply this: any action founded upon a "federal right" presents a federal question within the original jurisdiction of the federal courts. Appellee thus states a jurisdictional rule which Congress might properly have enacted, *but which it did not*. The rule so stated obliterates the basic distinction between *actions* which themselves arise under and by virtue of a federal statute, and actions that do not so arise but that present *questions* of federal law or federal rights as the subject-matter of the dispute. [*New Marshall Co. v. Marshall Engine Co.*, 223 U. S. 473, 478-479.] It is the *action* and not the *right* which must arise under the federal statute:

"A suit to enforce a *right which takes its origin in the laws of the United States* is not necessarily or for that reason alone, one arising under those laws." [*Shulthis v. McDougal*, 225 U. S. 561, 569; *Teague v. Brotherhood of Locomotive Firemen* (C. C. A. 6), 127 F. 2d 53, 55.]

Appellee relies upon *Gully v. First National Bank*, 299 U. S. 109, for the broad statement that "If the right is federal in nature, there is federal jurisdiction" [Appellee's Br. p. 7], *but the Gully case expressly negatives such a conclusion*. It is true that the court there stated that a right or immunity claimed under federal law "must be an element, and an essential one, of the plaintiff's cause of

action” [299 U. S. at 112], but the decision is not authority for the proposition that the existence of such a right is determinative of the jurisdiction of the District Court. Assuming the existence of a “federal right” as the basis of plaintiff’s cause of action, still

“*A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto* (citing cases), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. (Citing cases.) Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff’s cause of action and anticipates or replies to a probable defense.

“. . . Partly under the influence of statutes disclosing a new legislative policy, partly under the influence of more liberal decisions, the probable course of the trial, *the real substance of the controversy*, has taken on a new significance. ‘A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.’ [299 U. S. at 113-114, per Cardozo, J.; italics added.]

It is not enough, therefore, that the right claimed be “federal” in nature or have its genesis in the federal statute. It must appear from the complaint that a present and actual dispute is presented concerning the existence or enforcement of that right, and not merely of the obligations arising from its exercise. If the existence of the

right is not seriously in dispute, its “federal nature” does not entitle the claimant to invoke the jurisdiction of the federal courts. [*Gully v. First National Bank, supra.*]

A. The Claim of a Right Under the Copyright Laws Does Not Create Federal Jurisdiction Unless It Also Appears Probable That the Right, and Not Merely the Obligations Arising From Its Exercise, Will Be in Actual and Substantial Dispute.

In practice, as the rule of the *Gully* case is applied to actions under the copyright and patent laws, the federal courts have been held to have jurisdiction only of those actions directly and primarily presenting a controversy relating to the validity or infringement of a patent or copyright. Actions at common law or in equity, in which no dispute exists as to the construction or application of any statutory provision, which seek only the enforcement of obligations arising from the exercise of the copyright or patent, or seek to effect the transfer or determination of title to the copyright or patent, are not within the compass of Section 1338(a). [*Luckett v. Delpark*, 270 U. S. 496, 504, 511; *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255, 259; *Measurements Corp. v. Ferris Instruments Corp.* (C. C. A. 3), 159 F. 2d 590, 594; *Dill Mfg. Co. v. Goff* (C. C. A. 6), 125 F. 2d 676, 678-679, *cert. den.* 317 U. S. 672; *Laning v. Natl. Ribbon Co.* (C. C. A. 7), 125 F. 2d 565, 566-567; *Binger v. Unger* (S. D. N. Y.), 6 F. R. D. 44, 45.]

It is extremely significant, in view of appellee’s unsupported conclusion that jurisdiction under Section 1338(a) extends to *any* case in which a right under the copyright statute is claimed although not disputed [Appellee’s Br. pp. 7-8, 10-15], that of the hundreds of cases in which

federal jurisdiction under Section 1338(a) has been invoked *the only reported cases in which such jurisdiction has been upheld have been those in which the primary issue was the validity or infringement of the patent or copyright!* The total absence of decisions upholding such jurisdiction in cases involving the other “rights” created by the copyright or patent statutes speaks eloquently of the universal application of the rule of the *Gully* case under Section 1338(a).

Appellee purports to find in federal jurisdiction of infringement cases an analogy to the present case that neither the cases nor the statute sustain. The copyright laws of the United States, like those of any other jurisdiction, were born of a single specific purpose: to secure to the creator of an original work in letters, art or music, a limited statutory monopoly to multiply and to sell copies of his work or to license its performance, and to be protected against the unauthorized exercise of any right in that work by any other person. Without this right of protection against the usurpation of the proprietor’s exclusive rights, statutory copyright would not exist. [*Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 347; *Wheaton v. Peters*, 33 U. S. 223, 230-232; *Loew’s Incorporated v. Superior Court*, 18 Cal. 2d 419, 424-425, 115 P. 2d 983.]

A copyright is infringed only when the exclusive rights in a particular work secured to the copyright proprietor by the copyright act [17 U. S. C. Sec. 1] are usurped without authority. The bringing of an action for infringement presupposes a dispute concerning the existence of the exclusive right allegedly usurped. Whether the “federal” right exists and whether it has been violated

are the main, if not the only, elements of the controversy. The dispute over that right is “basic” and not “collateral.”

In addition, the action for infringement is itself prescribed and governed solely and specifically by statute. [17 U. S. C. Secs. 101-116.] The nature of the action and the scope and enforcement of the remedy, the enforcement and review of the judgment, order or decree obtained, even the award of costs and attorney’s fees, are expressly covered by statute. Not only is a federal right in substantial dispute, but a federal remedy *alone* can be invoked for its redress. [*Caruthers v. R.K.O. Radio Pictures* (S. D. N. Y.), 20 Fed. Supp. 906, 908; *King v. Edw. B. Marks Music Corp.* (S. D. N. Y.), 56 Fed. Supp. 446, 450.] As stated in *Henry v. A. B. Dick Co.*, 224 U. S. 1, 14-15, cited by appellee at page 12 of its brief, the action for infringement is within the jurisdiction of the federal court, not because it is founded upon a right created by the copyright statute, but because it directly and primarily involves a dispute over that right and because the *remedy* invoked is one *created and controlled* by the copyright statute.

B. An Action to Foreclose a Mortgage of a Copyright Neither Invokes a Federal Remedy nor Presents a Probable Dispute Over a Federal Right.

It is clear that, assuming for purposes of this discussion only that the right to mortgage a copyright is a “federal” right, the existence of that right, for reasons stated above, does not of itself constitute an action to foreclose the mortgage one arising under the copyright laws. The right itself is not in dispute in the foreclosure action; it will not be denied that the proprietor of a copyright has

the right to mortgage it. It cannot be said, with any degree of logic, that the complaint in a normal foreclosure action necessarily or probably raises any actual controversy over the existence of the right in the copyright proprietor; "the real substance of the controversy," if one is presented, revolves around the obligations created in the exercise of the right. The most that can be said is that the true controversy is *based upon* the right granted under the statute, but the existence of a federal right at the seat of the controversy does not confer jurisdiction on the federal courts. The *controversy itself*, not merely the right, must arise under the statute. [*Gully v. First National Bank*, 299 U. S. 109, 117-118.]

Illustrative of this rule in its application to the present case is *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, relied upon by appellee. Among the rights specifically created by Section 1 of the copyright statute is the exclusive right "to print, reprint, publish, copy, and *vend* the copyrighted work."² [17 U. S. C. Sec. 1(a). *Italics added.*] Pursuant to, and in exercise of its statutory right to vend its copyrighted and published work, plaintiff caused the same to be sold under contracts of sale requiring minimum resale price maintenance. Defendant resold copies of the work at less than the minimum price. Plaintiff thereupon brought suit for *infringement*, alleging that, pursuant to its statutory right to vend copies of its work, it had sold

²If we adopt as the test of whether a right is created by federal statute that advanced by appellee, that the right not exist at common law, then there can be no doubt that the right to vend the published work is a "federal" right since a publication of the work at common law destroyed *all rights* of the author therein. [*Loew's Incorporated v. Superior Court*, *supra*, 18 Cal. 2d 419, 423, 115 P. 2d 983.]

same under specified terms and conditions, and defendant's violation of those terms and condition constituted infringement of the exclusive right.

The analogy of the *Bobbs-Merrill* case to that here presented is clear: plaintiff, pursuant to its statutorily conferred right, had exercised that right and now sought to enforce obligations arising from that exercise. Manifestly, the action was *based upon* the statutory right to vend copies of the copyrighted work, and if the "federal nature" of the right were determinative, the action would have been properly brought in the federal court.

The controversy presented in the *Bobbs-Merrill* case, however, was not over the existence of the right, which was clear, but was rather over rights and obligations arising from its exercise. There, as here, the federal right was simply and solely the undisputed genesis of the controversy, and the United States Supreme Court accordingly held that the federal court had no jurisdiction of the action, that once the statutory right had been exercised, a controversy arising out of its exercise and not affecting or questioning the existence of the right was not cognizable by the federal court. [210 U. S. at 350-351.]

By a parity of reasoning, a foreclosure action presents no controversy over the existence of the right to mortgage a copyright, which is clear. Whatever controversy may be presented arises from the exercise of the undisputed right, only collaterally relating to the statute creating the right. Like the contract in the *Bobbs-Merrill* case, the genesis of the right is not determinative of the existence of jurisdiction. [See also *Scribner v. Straus*, 210 U. S. 352, 354.]

The same result, significantly, has been reached in cases involving assignments of copyright or licenses granted by the copyright proprietor. To the extent that Section 28 of the copyright statute "creates" the right to mortgage, upon which appellee relies, by the same token and in the same manner it "creates" the right of assignment of the statutory copyright. Similarly, Section 28 creates the right partially to "assign," or to license, the use of something less than the whole copyright, such as dramatization rights, motion picture rights, etc. [*Harper Bros. v. Klaw* (S. D. N. Y.), 232 Fed. 609.] Indeed, it might even be said that the right to assign is more clearly "federal" in nature than the right to mortgage, since the copyright statute specifically governs the acknowledgment, recordation and certification of *assignments*, but not of *mortgages*. [17 U. S. C. Secs. 29-32.]

Notwithstanding that the rights of assignment and licensing are thus federally created, actions based upon such assignments or licenses do not arise under the statute creating the right and cannot be brought in the federal courts in the absence of diversity of citizenship. [*New Marshall Co. v. Marshall Engine Co.*, *supra*, 223 U. S. 473, 478-479; *Danks v. Gordon* (C. C. A. 2), 272 Fed. 821, 827; *Local Trademarks, Inc. v. Powers* (E. D. Pa.), 56 Fed. Supp. 751, 752; *Fisher v. Hill*, 212 App. Div. 646, 209 N. Y. Supp. 369, 370-371; *Broadcast Music, Inc. v. Buck*, 34 N. Y. S. 2d 337, 338.] This absence of federal jurisdiction applies even to an action to set aside an invalid assignment or license, notwithstanding that the acts of defendant, if the assignment or license is held invalid, constitute infringement for which an injunction is prayed. [*New Marshall Co. v. Marshall Engine Co.*, 223 U. S. 473, 478-479.]

Nor is the jurisdiction of the federal courts enlarged because the foreclosure action will result in a transfer of title to, rather than rights in, the copyright or patent. The rule is clear that actions brought for the specific and primary purpose of determining and compelling the transfer of title to a patent or copyright are not cognizable in the federal courts, even though the ownership of a copyright is clearly a federal right. [*Measurements Corp. v. Ferris Instrument Corp.* (C. C. A. 3), 159 F. 2d 590, 594, and cases cited therein; *Ager v. Murray*, 105 U. S. 126, 131; *Pacific Bank v. Robinson*, 57 Cal. 520, 525; see also cases cited, Appellant's Op. Br. p. 10.]

Appellee is not aided by its attempted shift of emphasis [Appellee's Br. pp. 12-13] from the *right* claimed to the *remedy* sought. The remedy sought in a specific action confers jurisdiction on the federal court *only* when that remedy itself is created and specifically governed by federal statute. The significance of the remedy sought in *Henry v. A. B. Dick Co.*, 224 U. S. 1, cited by appellee, was that the primary purpose of the action was the redress of an alleged *infringement* of a patent, the remedy for which is wholly statutory. [35 U. S. C. Secs. 67-71.] The remedy of injunction for patent infringement is in fact specifically made available in "the several courts vested with jurisdiction of cases arising under the patent laws." [35 U. S. C. Sec. 70.] We search the copyright statute in vain for any provisions relating to the remedy of *foreclosure* of a copyright mortgage.

C. Federal Jurisdiction Under Section 1338(a) Is Governed by the True Nature of the Controversy, Not by the Form of the Action. It Is Not Affected by Whether an Action Is Labeled In Rem or In Personam.

First. We are somewhat at a loss to perceive the relevance to this case of the superannuated concept of the unbridgable gulf between actions *in rem* and actions *in personam*, upon which appellee places such emphatic reliance. [Appellee's Br. pp. 11-14, 16-19, 30.] It is apparent that appellee seeks to brush aside the indistinguishable assignment and license cases by impatiently dismissing them as "actions *in personam*," whereas a mortgage foreclosure action, being an "action *in rem*," is a totally different species of action, not governed by the same rules. We are not alone in our difficulty, however, since this distinction seems heretofore to have escaped the courts as well as ourselves. At least it has presented no obstacle to the finding of lack of federal jurisdiction in such traditionally *in rem* actions as those brought to quiet title to copyrights and patents [see cases cited, Point I, B, *supra*], and, we presume, the fact that a probate decree operates *in rem* would not prevent a state court decree of distribution from transmitting a copyright to the legatees thereof under the will of the proprietor.

Moreover, the Supreme Court has specifically held that this feudal distinction is of little or no value in determining jurisdiction with respect to an intangible:

"Distinctions between actions *in rem* and those *in personam* are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a

system quite unlike our own . . . *The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification.* American courts have sometimes classed certain actions *in rem* because personal service of process was not required, and at other times have held personal service of process was not required because the action was *in rem*. See cases collected in Freeman on Judgments Sec. 1517 *et seq.*, 5th ed.

“. . . we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.” [*Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 312-313. Italics added.]

It is manifestly unreasonable to predicate federal jurisdiction or the absence thereof upon a concept so elusive and so uncertain, whose legal effect itself varies from state to state, and which the Supreme Court of the United

States has specifically stated has little or no relevance with relation to intangibles.

Moreover, whether an action to foreclose a mortgage on tangible or intangible personalty be said to be *in rem* or *quasi in rem* or *in personam*, depending upon the court making the classification and the purpose for which it is made (the authorities are considerably less inflexibly certain than appellee appears to be), this much is clear: *the classification of the action does not affect the jurisdiction of the court to decree a foreclosure*. An action to foreclose is transitory, not local; a court which has jurisdiction of the person of the mortgagor may decree foreclosure of the mortgage and sale of the mortgaged property, irrespective of whether the property is physically within or without the court's territorial jurisdiction. [*Hall v. Milligan*, 221 Ala. 233, 128 So. 438, 439; *Emerson-Brantingham Co. v. Giles*, 53 Utah 539, 174 Pac. 181, 182; 14 C. J. S., *Chattel Mortgages*, Sec. 401, pp. 1051-1052; see *Estate of Newton*, 35 Cal. 2d 830, 221 P. 2d 952.] If the action is transitory and personal to that extent in the case of property having a physical location, it necessarily follows that the same rule must apply to property that by its nature has no such physical location, except derivatively through its owner. [*Curry v. McCandless*, 307 U. S. 357, 365-366.]

Since copyrights, under appellee's view, are like choses in action in that they have "no spatial or tangible existence, control over them can 'only arise from control or

power over the persons whose relationships are the source of the rights and obligations.’” [*Standard Oil Co. v. New Jersey*, 341 U. S. 428, 439; *Estin v. Estin*, 334 U. S. 541, 548.] Since the fiction of “situs” of intangibles no longer controls the determination of jurisdiction, it necessarily follows that the absence of such “situs,” even in an “action *in rem*,” cannot oust a court of jurisdiction, nor can its presence confer jurisdiction that does not otherwise exist. “A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent.” [*Curry v. McCandless*, 307 U. S. 357, 366.]

Second. The foregoing discussion is equally demonstrable of the fallacy of appellee’s reliance on an argument culled from *Stevens v. Gladding*, 58 U. S. 448, and *Ager v. Murray*, 105 U. S. 126: that by reason of the peculiar nature of a copyright, *only* the federal courts can assert jurisdiction over it. [Appellee’s Br. pp. 12-15.] Appellee’s misconception of the true nature of those decisions and their import for the present case does, however, deserve examination.

Whether a foreclosure decree is or is not parallel to the situation presented by a writ of execution is not material to the present case, *since no decision of any federal court specifically holds that only a federal court may levy execution on a copyright.* Appellee makes much of the “holdings” of *Stevens v. Gladding* and *Ager v. Murray*, without mentioning the fact that neither case “held” or

is authority for the proposition for which it is cited! The “holding” quoted from *Stevens v. Gladding*, 58 U. S. at 451, was not a decision that execution could not issue on a copyright, but was simply a discussion of the difficulties which might arise from such a levy, *and even that discussion was dictum, unnecessary to the disposition of the case.* *Stevens v. Gladding* is authority only for the rule previously stated in *Stevens v. Cady*, 55 U. S. 528, that the judicial sale of a copyrighted work does not convey title to the copyright, *in the absence of a manifested intention so to do.*

The “holding” of *Stevens v. Gladding* upon which appellee relies was specifically characterized as mere dictum by the Court in *Ager v. Murray*, 105 U. S. 126, 129, a case which is actually authority for a substantially contrary result. The Court did not, as appellee states, quote *Stevens v. Gladding* “with approval,” but merely held [105 U. S. at 130-131] that “the difficulties of which the learned Justice here speaks” were present, *if at all*, only in the levy of *an execution at law*, which was traditionally levied only upon tangible property, and had no application to a *creditor’s bill in equity* to subject by decree the debtor’s assets to a judicial sale for payment of his debt. It was there specifically held that *a judicial sale of a patent or copyright, pursuant to the decree of a state court sitting in equity and having jurisdiction of the person of the copyright proprietor, was valid and binding and effected a proper transfer of the patent or copyright to the purchaser at such sale.*

In any event, therefore, *Ager v. Murray* supports rather than refutes the principle that the foreclosure of a copyright mortgage is properly decreable by a state court. The foreclosure of a mortgage, like a creditor's bill and unlike the writ of execution considered in *Stevens v. Gladding*, may properly reach property that does not have "a tangible and visible existence within the jurisdiction of the court." [*Ager v. Murray*, 105 U. S. at 130-131.] Like a creditor's bill, a mortgage foreclosure is an equitable proceeding, not an action at law. [*Elmore Jameson Co. v. Smith*, 34 Cal. App. 2d 609, 616-617, 93 P. 2d 1063; *Bush v. Bank of America*, 1 Cal. App. 2d 588, 592, 37 P. 2d 168; *Simon Newman Co. v. Woods*, 85 Cal. App. 360, 363, 259 Pac. 460.] Judicial sale pursuant to an equitable decree of foreclosure is indistinguishable in its effect from judicial sale pursuant to an equitable decree in a creditor's suit. In either case, a court having personal jurisdiction of the mortgagor or debtor can subject the patent or copyright to judicial sale and convey valid title to the purchaser. [*Ager v. Murray*, *supra*, at 130-131; *Pacific Bank v. Robinson*, 57 Cal. 520, 525.]

Appellee's argument based on the weary fiction that the "situs" of a copyright "is co-extensive with the jurisdiction of the authority which gives it life, that is the federal government" [Appellee's Br. p. 11] cannot, even in the most skillful of hands, convert that fiction into a jurisdictional rule. In the last analysis, a copyright is personal property, intangible it is true, but no more intangible

than a share of stock, a debt, or any chose in action. It no more “defies application of the common law requisite of mortgages or the remedies provided by common law or local statutes” [Appellee’s Br. p. 11] than does any other form of intangible personal property. Since it in fact has *no* spatial or tangible existence, *any* court with jurisdiction of the person of the proprietor has jurisdiction to determine and affect rights in or ownership of the copyright:

“Situs of an intangible is fictional but control over parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible.” [*Standard Oil Co. v. New Jersey*, 341 U. S. 428, 439-440.]

Nor is there any practical justification for adherence to such an outworn fiction as appellee proposes. Just as a state court with jurisdiction of the parties may decree the sale of a patent or copyright in a creditor’s suit, or transfer title thereto in a quiet title action or by probate decree, so may it decree judicial sale of the copyright or patent in a foreclosure action and transfer title thereto valid for all purposes throughout the United States. The imaginary difficulties conjured up by appellee with respect to the extraterritorial effect of the decree are totally dissipated by the clear and express mandate of the Full Faith and Credit Clause. [*Standard Oil Co. v. New Jersey*, 341 U. S. 428, 442-443 *and cases cited therein*.]

II.

The Right to Mortgage a Copyright Is Not an Exclusively "Federal" Right but Exists Under the Laws of the State of California Independent of Federal Statute.

Since, for the reasons outlined above, an action to enforce even a "federal" right does not arise under a federal statute unless the existence of the right itself is primarily, directly, and substantially in dispute, and since this action does not so arise, it is irrelevant whether the right to mortgage a copyright is or is not a "federal" right. For the reasons we have heretofore outlined, however [Appellant's Op. Br. pp. 16-18], we believe that it is not, and that appellee's minor premise is therefore as unfounded as its major premise. Nothing said by appellee in support of its contention diminishes the force of our argument, and we shall not repeat it here.

Appellee also contends, however [Appellee's Br. p. 11], that the right to mortgage a copyright exists only under federal law for the reason that *Cal. Civil Code*, Section 2955 otherwise makes such a mortgage invalid in California. There is no merit to this argument.

Initially, it should be noted that appellee's argument defeats itself. Since Section 28 does make copyrights mortgageable (as well as assignable and devisable), copyrights are *ipso facto* mortgageable in California and the California courts must give effect to such mortgages, notwithstanding any contrary provisions of State law. [*Estate of Lindquist*, 25 Cal. 2d 697, 704-705, 154 P. 2d 879.]

But California law does not exclude copyrights from hypothecation by mortgage. *Cal. Civil Code*, Section 2973 expressly makes mortgages excluded under Section 2955 *valid* as between mortgagor and mortgagee, and as to all persons with notice thereof. An action to foreclose

such a mortgage, as, for example, a chattel mortgage of a copyright, may therefore, properly be maintained by the mortgagee in California under Section 2973. [*Western Oil & Ref. Co. v. Venago Oil Corp.*, 218 Cal. 733, 740, 24 P. 2d 971; *Old Settlers' Inv. Co. v. White*, 158 Cal. 236, 240-241, 110 Pac. 922; *McLeod v. Barnum*, 131 Cal. 605, 606-607, 63 Pac. 924; *Perkins v. Maier Brewery*, 133 Cal. 496, 498, 65 Pac. 1030; *Ronning v. Way*, 18 Cal. App. 527, 529-530, 123 Pac. 615; *In re Grainger* (C. C. A. 9), 160 Fed. 69, 72.]

Conclusion.

The primary determinant of the existence or non-existence of federal jurisdiction is the nature of the *action*, not of the *right*. It is immaterial that a copyright is a federal right, since the foreclosure action involved no dispute respecting its existence or enforcement. A mortgage of copyright is, as we have demonstrated, not a federally created right, but even if it were, that fact would be likewise immaterial since its existence was not an element of controversy in the foreclosure action. The foreclosure of a mortgage necessarily involves neither a dispute as to the existence of the property nor a controversy as to the existence of the right to mortgage it. The *action* is one to foreclose a mortgage; such controversy as it may present ordinarily requires neither construction nor application of federal law for its solution. Since no federal question is presented, no federal jurisdiction can exist. The judgment should therefore be reversed.

Respectfully submitted,

LOEB and LOEB,
HERMAN F. SELVIN,
SAUL N. RITTENBERG,
HARRY L. GERSHON,

Attorneys for Appellant.

No. 13044

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

REPUBLIC PICTURES CORPORATION,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Appellee.

Petition of Bank of America National Trust and
Savings Association for Leave to File Brief as
Amicus Curiae and Brief of Amicus Curiae.

SAMUEL B. STEWART, JR.,
HUGO A. STEINMEYER,
ROBERT VAN BUSKIRK and
ROBERT H. FABIAN,

650 South Spring Street,
Los Angeles 14, California,

Attorneys for Amicus Curiae.

FILED

DEC 18 1951

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No. 13044

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REPUBLIC PICTURES CORPORATION,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Appellee.

Petition of Bank of America National Trust and
Savings Association for Leave to File Brief as
Amicus Curiae.

*To the Honorable the Judges of the United States Court
of Appeals for the Ninth Circuit:*

Comes now Bank of America National Trust and Savings Association and petitions the Court for leave to file as *Amicus Curiae* the within brief in support of the position of the appellant herein.

The ground of this petition is that if the erroneous judgment herein appealed from is allowed to stand, it will cast doubt upon the validity of several state court judgments heretofore obtained by petitioner in actions to foreclose motion picture copyright mortgages.

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION,

By ROBERT H. FABIAN,

Attorney for Petitioner.

No. 13044

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

REPUBLIC PICTURES CORPORATION,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Appellee.

BRIEF OF AMICUS CURIAE.

I.

Statement of the Case.

We adopt the statement of appellant contained in Appellant's Opening Brief, pages 2 to 4.

II.

Argument.

The Supreme Court of California has held in a situation closely analogous to the case at bar that jurisdiction lies in the State courts. We invite the Court's attention to the case of *Pendleton v. Ferguson*, 15 Cal. 2d 319, 101 P. 2d 81 (1940), where that Court held that an action to quiet title to letters patent was not an action arising under the patent laws of the United States over which the Federal

courts have exclusive jurisdiction. The Court said (p. 326):

Appellants contend that the trial court had no jurisdiction to hear or determine this action, but we cannot agree with this contention.

A review of the authorities convinces us that the issues raised by the pleadings in this action bring the case clearly within the jurisdiction of the courts of this state.

It appears to be the settled rule that while the federal courts have exclusive jurisdiction of all cases arising under the patent laws, such jurisdiction does not extend to all questions in which a patent may be the subject-matter of the controversy, for Courts of a state may try questions of title, and may construe and enforce contracts relating to patents.

As we understand the issues in this case, they simply involve a contract relating to the title to certain patents. A determination of whether or not the relief prayed for should be granted must be arrived at by the application of rules and principles of equity cognizable in the courts of this state and in no degree whatever upon any act of congress concerning patent rights.

The California Supreme Court then quoted with approval the opinion in *Lockett v. Delpark*, 270 U. S. 496, 46 S. Ct. 397, 70 L. Ed. 703 (1926), cited in Appellant's Opening Brief at pages 10 and 13, and in Appellee's Brief at pages 15, 19, 23 and 24.

The California District Courts of Appeal have also recognized the distinction between an action brought upon a contract of which a patent is the subject matter, and an

action directly arising under the patent laws, correctly holding that the state courts have jurisdiction of the former. (*Davis v. Kittle Mfg. Co.*, 134 Cal. App. 254, 262, 25 P. 2d 253 (1933); *Dekins v. The Superior Court*, 90 Cal. App. 630, 631-632, 266 Pac. 563 (1928).)

We recognize that this Court is not bound to follow the decisions of the California Supreme Court on questions involving Federal jurisdiction. We think it proper, however, to invite the Court's attention to the well considered decisions of the state courts because we believe they contain correct and persuasive statements of the fundamental rules involved here. Furthermore, the interests of uniformity require that this Court give weight to these decisions.

It seems to us that the principles announced in the case of *Wilson v. Sandford*, 51 U. S. (10 How.) 99 (1850), are controlling in this case. The only differences between that case and the case at bar are the following: In that case the plaintiff sought forfeiture of a license on a patent and an injunction against infringement. In this case the plaintiff sought forfeiture under, or foreclosure of, a "mortgage and assignment" of a copyright, without also seeking to enjoin infringement. These differences do not render the rule of that case inapplicable because (1) the statutory provisions regarding jurisdiction are the same for both patents and copyrights; (2) if there is no federal jurisdiction in an action for forfeiture coupled with a cause seeking to enjoin infringement, certainly the elimination of the latter cause, as was done in this case, does not confer jurisdiction, and (3) there is no essential difference between an action seeking to forfeit a license and an action seeking to foreclose a mortgage because in both instances the essence of what the plaintiff

seeks is the enforcement or forfeiture of rights arising under contracts or conveyances having patents or copyrights as their subject matter.

In *Lockett v. Delpark*, *supra*, page 504, the Supreme Court said that "jurisdiction fails because the complainant in his bill seeks forfeiture of licensed rights in equity before he can rely on the patent laws to enjoin infringement of his patent rights and obtain damages therefor." Paraphrasing this language for application to the instant case: "Jurisdiction fails because the complainant in his bill seeks forfeiture of the mortgagor's equity before he can rely on the copyright laws to enjoin infringement of his copyright rights and obtain damages therefor." We submit that there is not such a difference between "forfeiture of licensed rights in equity" and "forfeiture of a mortgagor's equity" as to require the conclusion that federal jurisdiction does not exist in the one case but exists in the other.

The judgment of the District Court constitutes an unwarranted and unauthorized usurpation of jurisdiction, and should be reversed.

Respectfully submitted,

SAMUEL B. STEWART, JR.,

HUGO A. STEINMEYER,

ROBERT VAN BUSKIRK and

ROBERT H. FABIAN,

Attorneys for Amicus Curiae.

No. 13045

United States
Court of Appeals
for the Ninth Circuit

LINDSAY C. HOWARD,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

FILED

OCT 11 1951

Petition to Review a Decision of The Tax Court
of the United States

PAUL P. O'BRIEN
CLERK

United States
Court of Appeals
for the Ninth Circuit

LINDSAY C. HOWARD,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

A. CALDER MACKAY, Esq.

ARTHUR McGREGOR, Esq.

HOWARD W. REYNOLDS, Esq.

ADAM Y. BENNION, Esq.

NEIL S. McCARTHY, Esq.

For Respondent:

H. A. MELVILLE, Esq.

[1*]

* Page numbering appearing at top of page of original certified Transcript of Record.



The Tax Court of the United States

Docket No. 20860

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1948

Nov. 1—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 2—Copy of petition served on General Counsel.

Dec. 8—Answer filed by General Counsel.

Dec. 8—Request for hearing in Los Angeles, Calif., filed by General Council.

Dec. 9—Notice issued placing proceeding on Los Angeles Calendar. Answer and request served.

1950

Apr. 27—Hearing set June 26, 1950, Los Angeles, Calif.

July 13—Hearing had before Judge Van Fossan on merits, stipulation of facts filed. Briefs, Aug. 28, 1950. Replies, Sept. 12, 1950.

Aug. 10—Transcript of Hearing 7/13/50 filed.

Aug. 18—Motion for extension to Sept. 26, 1950, to filed brief filed by taxpayer. Granted 8/18/-50.

Sep. 25—Brief filed by taxpayer. Copy served 9/27/-50.

Sep. 26—Brief filed by General Counsel.

Oct. 10—Motion for extension to Nov. 10, 1950, to file reply brief filed by General Counsel. Granted 10/11/50.

Oct. 12—Reply brief filed by taxpayer. Copy served.

Nov. 10—Reply brief filed by General Counsel. Served 11/13/50.

1951

Jan. 24—Findings of Fact and Opinion rendered. Judge Van Fossan, decision will be entered under Rule 50. Copy served.

Feb. 5—Motion to correct findings of fact filed by petitioner. Denied 2/12/51.

Feb. 5—Motion to reconsider the Court's Opinion on the second issue filed by petitioner. Denied 2/12/51.

1951

Apr. 10—Respondent's Computation for entry of decision filed.

Apr. 12—Hearing set May 23, 1951, Washington, D. C., under Rule 50.

Apr. 24—Consent to respondent's computation for entry of decision filed.

Apr. 26—Decision entered, Van Fossan, J Div. 9.

July 23—Petition for Review by U. S. Court of Appeals for the Ninth Circuit with Assignments of Error filed by taxpayer.

July 23—Proof of Service filed.

July 23—Designation of Record filed by taxpayer with service acknowledgment thereon.

The Tax Court of the United States

Docket No. 23168

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1949

May 18—Petition received and filed. Taxpayer notified. Fee paid.

May 19—Copy of petition served on General Counsel.

July 5—Answer filed by General Counsel.

July 5—Request for Hearing in Los Angeles, Calif., filed by General Counsel.

July 11—Notice issued placing proceeding on Los Angeles, Calif., calendar. Service of answer and request made.

1950

Apr. 27—Hearing set June 26, 1950, Los Angeles.

July 13—Hearing set before Judge Van Fossan on merits, stipulation of facts filed. Briefs, Aug. 28, 1950. Replies Sept. 12, 1950.

Aug. 10—Transcript of Hearing 7/13/50 filed.

Aug. 18—Motion for extension to Sept. 26, 1950, to file brief by taxpayer. Granted 8/18/50.

Sep. 25—Brief filed by taxpayer. Copy served 9/27/-50.

Sep. 26—Brief filed by General Counsel.

1950

Oct. 10—Motion for extension to Nov. 10, 1950, to filed reply brief filed by General Counsel. Granted 10/11/50.

Oct. 12—Reply brief filed by taxpayer. Copy served.

Nov. 10—Reply brief filed by General Counsel.

1951

Jan. 24—Findings of Fact and Opinion rendered, J. Van Fossan, decision will be entered under Rule 50. Copy served.

Feb. 5—Motion to correct findings of fact filed by petitioner. Denied 2/12/51.

Feb. 5—Motion to reconsider the Court's Opinion on the second issue filed by petitioner. Denied 2/12/51.

Apr. 10—Respondent's computation for entry of decision filed.

Apr. 12—Hearing set May 23, 1951, Washington, D. C., under Rule 50.

Apr. 24—Consent to respondent's computation for entry of decision filed.

Apr. 26—Decision entered. Van Fossan, J. Div. 9.

July 23—Petition for Review by U. S. Court of Appeals for the Ninth Circuit with Assignments of Error filed by taxpayer.

July 23—Proof of Service filed.

July 23—Designation of record filed by taxpayer with service acknowledged thereon. [2]

The Tax Court of the United States

Docket No. 20860

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated August 6, 1948, and as a basis of his proceeding alleges as follows:

1. Petitioner is an individual residing at 1230 Benedict Canyon Drive, Beverly Hills, California. The returns for the periods involved were filed with the Collector of the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on August 6, 1948.

3. The taxes in controversy are income and victory tax for the calendar year 1943 in the sum of \$6,204.99 and income tax for the calendar years 1944 and 1945 in the sums of \$3,439.12 and \$2,077.84, respectively. In addition, petitioner claims an overpayment for the year 1943 due to the Commissioner's reduction of partnership income.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in disallowing deductions for legal fees and expenses paid by peti-

tioner during the taxable years 1943 and 1944 in the respective amounts of \$10,017.91 and \$8,451.24.

(b) The Commissioner erred in disallowing depreciation deductions for the years 1944 and 1945 in the respective amounts of \$454.54 and \$1,476.98.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) During the year 1943, while petitioner was a Captain in the United States Army, court martial proceedings were initiated against him, seeking to cause his dishonorable discharge from the Army. Petitioner was acquitted of the charges brought against him.

(b) In the year 1938 petitioner and his then wife, Anita Z. Howard, entered into a property settlement agreement. Shortly thereafter Anita Z. Howard obtained a divorce from petitioner in the State of Nevada, the decree of divorce incorporating therein said property settlement agreement. In accordance with the terms of that agreement, petitioner paid his former wife \$1,250.00 per month until January 1, 1942. The agreement required such monthly payments to be made until the re-marriage of Anita Z. Howard.

(c) Subsequent to January 1, 1942, petitioner discontinued said monthly payments, as a result of which Anita Z. Howard commenced an action against petitioner in the Superior Court in and for the County of San Francisco, California, for the purpose of establishing the Nevada decree as a judgment of the State of California and to recover sums due under the property settlement agreement incorporated therein.

(d) Petitioner filed an answer and a cross complaint in said action, alleging that (1) the obligation to make monthly payments had been terminated by reason of a subsequent Mexican common law marriage of Anita Z. Howard, and (2) the property settlement agreement had been procured by the fraud of Anita Z. Howard. Judgment in that proceeding, after prolonged litigation, ultimately was rendered in favor of Anita Z. Howard. See *Howard vs. Howard*, 157 Pac. (2d) 874, 161 Pac. (2d) 681, and 163 Pac. (2d) 439.

(e) For attorneys' fees, costs and expenses in the two proceedings referred to above, the petitioner paid the amounts of \$10,017.91 and \$3,451.24 during the tax years 1943 and 1944, respectively. Petitioner is informed and believes that said amounts are deductible from gross income under the provisions of Section 23 (a) of the Internal Revenue Code and that the Commissioner's disallowance thereof is erroneous and illegal.

(f) During the years 1944 and 1945 sundry assets owned by petitioner in connection with his ranch (to-wit, a manager's house, furniture and linens) sustained depreciation in the amounts of \$454.54 and \$1,476.98, respectively. Petitioner is informed and believes that such depreciation is allowable as deductions under the Internal Revenue Code and that the Commissioner's disallowance thereof is erroneous and illegal.

Wherefore, petitioner prays that this Court may hear the proceeding and determine that the Commis-

missioner erred in the particulars hereinabove set forth and grant to the petitioner such other and further relief, including refunds, as to it seems just and proper in the premises.

Dated October 26, 1948.

Respectfully submitted,

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Counsel for Petitioner.

Of Counsel:

/s/ NEIL S. McCARTHY,

State of California,
County of Los Angeles—ss.

Lindsay C. Howard, being first duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except the matters which are therein stated to be upon information and belief, and that as to those matters he believes it to be true.

/s/ LINDSAY E. HOWARD

Subscribed and sworn to before me this 29th day of October, 1948.

[Seal] /s/ MARY E. WHITTHORNE,
Notary Public in and for said County and State.
My Commission expires November 26, 1949.

EXHIBIT "A"

Treasury Department, Internal Revenue Service
417 So. Hill St., Los Angeles 13, Calif.

Aug. 6, 1948

Office of Internal Revenue Agent in Charge
Los Angeles Division
LA:IT:90D:LHP

Mr. Lindsay C. Howard
1230 Benedict Canyon Drive
Beverly Hills, California

Dear Mr. Howard:

You are advised that the determination of your income and victory tax liability for the taxable year ended December 31, 1943 discloses a deficiency of \$6,204.99, and that the determination of your income tax liability for the taxable years ended December 31, 1944 and 1945 discloses a deficiency of \$5,516.96, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

Exhibit "A"—(Continued)

it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner,

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in
Charge.

Enclosures: Statement, Form of waiver.

STATEMENT

LA:IT:90D:LHP

Mr. Lindsay C. Howard
1230 Benedict Canyon Drive
Beverly Hills, California

TAX LIABILITY FOR THE TAXABLE YEARS ENDED
DECEMBER 31, 1943, 1944 and 1945

Years	Deficiency
1943 Income and Victory Tax.....	\$ 6,204.99
1944 Income Tax	3,439.12
1945 Income Tax	2,077.84
Total.....	<u>\$11,721.95</u>

In making this determination of your income and victory tax liability careful consideration has been given to the report of examination dated April 6, 1948.

Exhibit "A"—(Continued)

ADJUSTMENTS TO NET INCOME
Taxable Year Ended December 31, 1943

	Income Tax Net Income	Victory Tax Net Income
Net income as disclosed by return.....	\$35,001.55	\$48,757.84
Unallowable deductions and additional income:		
(a) Salaries increased	15.00	15.00
(b) Interest on Government obligations increased	156.25	.....
(c) "Other deductions" decreased.....	10,017.91	.....
Total.....	<u>\$45,190.71</u>	<u>\$48,772.84</u>
Reduction of income:		
(d) Partnership income decreased.....	534.92	534.92
Net income adjusted.....	<u>\$44,655.79</u>	<u>\$48,237.92</u>

EXPLANATION OF ADJUSTMENTS

(a) The deductions of \$60.00 claimed for California unemployment insurance is reduced to \$30.00, the amount allowable. The excessive amount claimed, or \$30.00, is disallowed, your community share of which is \$15.00.

(b) Your distributive share of interest on United States bonds, subject to surtax only, from the partnership, Charles S. Howard, Lindsay C. Howard and Robert S. Howard, has been determined in the amount of \$1,704.18, in lieu of \$1,547.93 as reported in your return, an increase of \$156.25, which amount is added to your income.

(c) The deduction of \$10,017.91 claimed under "Other deductions" for expense incurred in connection with defense of suits is disallowed due to lack of substantiation that it constitutes a proper deduction under section 23(a) of the Internal Revenue Code. It is held that such amount represents a personal expense, which is not deductible. Section 24(a)(1), Internal Revenue Code.

(d) Income from partnerships has been determined in the amount of \$11,896.87, in lieu of \$12,431.79 as reported in your return, a decrease of \$534.92, as shown in the following:

Exhibit "A"—(Continued)

Explanations of Adjustments—(Continued)

	Reported	Corrected	Decrease (Increase)
Binglin, Stock Farms, Ltd.....	\$14,804.25	\$13,927.44	\$876.81
Charles S. Howard, Jr., Lindsay C. Howard, and Robert S. Howard as Tenants in Common	(2,372.46)	(2,030.57)	(341.89)
Totals.....	\$12,431.79	\$11,896.87	\$534.92

There is allowed, under the provisions of section 131 of the Internal Revenue Code, a credit of \$59.94 for income tax paid to a foreign country, not previously claimed in your return.

COMPUTATION OF INCOME AND VICTORY TAX—CURRENT TAX PAYMENT ACT OF 1943

Taxable Year Ended December 31, 1943

Income tax net income adjusted.....		\$44,655.79
Less: Personal exemption	\$ 1,200.00	-
Credit for dependents	1,400.00	2,600.00
Surtax net income.....		\$42,055.79
Less: Credit for interest on U.S. obligations..	\$ 1,704.18	
Earned income credit (10% of \$9,435.00).....	943.50	2,647.68
Income subject to normal tax.....		\$39,408.11
Normal tax at 6% on \$39,408.11.....	\$ 2,364.49	
Surtax on \$42,055.79.....	18,274.03	
Total income tax.....		\$20,638.52
Less: Income tax paid to a foreign country....		59.94
Net income tax.....		\$20,578.58
Victory tax net income adjusted.....	\$48,237.92	
Less: Specific exemption	624.00	
Income subject to victory tax.....		\$47,613.92

Exhibit "A"—(Continued)

Computation of Income and Victory Tax—(Continued)

Victory tax before credit (5% of \$47,613.92)	\$ 2,380.70
Less: Victory tax credit limited to	900.00
	<hr/>
Net victory tax	1,480.70
	<hr/>
1—Net income tax and victory tax	\$22,059.28
2—Income tax for 1942, as shown on line 17, page 4, of your 1943 return	\$ None
3—Amount of item 1 or 2, whichever is larger	\$22,059.28
4—Forgiveness feature:	
(a) Amount of item 1 or 2, whichever is smaller	\$ None
(b) Amount forgiven	None
	<hr/>
(c) Amount unforgiven	None
	<hr/>
5—Correct income and victory tax liability (item 3 plus item 4(c))	\$22,059.28
6—Income and victory tax liability shown on return account No. 923226	15,854.29
	<hr/>
7—Deficiency of income and victory tax	\$ 6,204.99

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1944

Net income as disclosed by return	\$69,759.44
Unallowable deductions and additional income:	
(a) Net gain from sale or exchange of capi- tal assets increased	\$ 586.28
(b) Partnership loss decreased	1,325.65
(c) Taxes decreased	15.00
(d) "Miscellaneous deductions" decreased	3,451.24
	<hr/>
Total	\$75,137.61
Additional deductions:	
(e) Business loss increased	241.29
	<hr/>
Net income adjusted	\$74,896.32

Exhibit "A"—(Continued)

EXPLANATION OF ADJUSTMENTS

(a) The net gain of \$24,279.81 reported in your return from the sale or exchange of capital assets is increased by \$586.28, representing disallowance of a long-term capital loss of that amount claimed for worthlessness of 234 shares of Durex, Inc., and 88-1/3 shares of Fire Chemicals, Inc. It has been determined that such securities did not become worthless within this taxable year. Section 23(k), Internal Revenue Code.

(b) Partnership loss has been determined in the amount of \$9,982.73, in lieu of \$11,308.38 as claimed in your return, an increase of income of \$1,325.65, as shown in the following:

	Per Return	Corrected	Income Increased
Binglin Stock Farms, Ltd.....	(\$15,108.43)	(13,819.40)	\$1,289.03
Charles S. Howard, Jr., Lindsay C. Howard, and Robert S. Howard as Tenants in Common	3,800.05	3,836.67	36.62
Totals.....	(\$11,308.38)	(\$ 9,982.73)	\$1,325.65

(c) The deduction of \$30.00 claimed for California unemployment tax is reduced to \$15.00, representing your community half of the amount allowable. The excessive amount claimed, or \$15.00, is disallowed.

(d) Legal fees and expenses deducted under "Miscellaneous deductions" in the amount of \$3,451.24 are disallowed, due to lack of substantiation that they constitute allowable deductions under section 23(a) of the Internal Revenue Code. It is held that such amount represents personal expenses, which is not deductible. Section 24(a)(1), Internal Revenue Code.

(e) It has been determined that a loss of \$3,982.03 was sustained from operation of your business, instead of \$3,740.74, the amount claimed in your return, an increase of \$241.29, an additional deduction for which is accordingly allowed. The amount of \$241.29 is computed as follows:

Exhibit "A"—(Continued)

Explanation of Adjustments—(Continued)

Additional repair expense allowable		\$113.69
Additional depreciation allowable	\$582.14	
Less: Personal expense disallowed (depreciation on personal residence and furnishings).....	454.54	127.60
		<hr/>
Additional loss allowable.....	\$241.29	

There is allowed, under the provisions of section 131 of the Internal Revenue Code, a credit of \$266.97 for income tax paid to a foreign country, not previously claimed in your return.

COMPUTATION OF ALTERNATIVE TAX

Taxable Year Ended December 31, 1944

Net income adjusted	\$74,896.32	
Less: Excess of net long-term capital gain over net short- term capital loss	23,720.26	
		<hr/>
Ordinary net income	\$51,176.06	
Less: Surtax exemptions	1,500.00	
		<hr/>
Balance (surtax net income).....	\$49,676.06	
Surtax on \$49,676.06.....	\$26,586.76	
Ordinary net income.....	\$51,176.06	
Less: Partially tax exempt interest..	\$320.77	
Normal tax exemption.....	500.00	820.77
		<hr/>
Balance subject to normal tax.....	\$50,355.29	
Normal tax (3% of \$50,355.29).....	1,510.66	
		<hr/>
Partial tax	\$28,097.42	
Plus: 50% of \$23,720.26.....	11,860.13	
		<hr/>
Alternative tax	\$39,957.55	

COMPUTATION OF TAX

Taxable Year Ended December 31, 1944

Net income adjusted.....	\$74,896.32	
Less: Surtax exemptions	1,500.00	
		<hr/>
Surtax net income.....	\$73,396.32	
Surtax	\$44,871.02	

Exhibit "A"—(Continued)

Computation of Tax—(Continued)

Net income adjusted.....	\$74,896.32	
Less: Normal-tax exemption	\$500.00	
Partially tax-exempt interest	320.77	820.77
		<hr/>
Net income subject to normal tax.....	\$74,075.55	
Normal tax at 3%.....		2,222.27
		<hr/>
Total normal tax and surtax.....	\$47,093.29	
Alternative tax	\$39,957.55	
Less: Income tax paid to a foreign country.....		266.97
		<hr/>
Correct income tax liability.....	\$39,690.58	
Income tax liability shown on return, account No. 3041961	36,251.46	
		<hr/>
Deficiency of income tax.....	\$	3,439.12

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1945

Net income as disclosed by return.....	\$31,799.21	
Unallowable deductions:		
(a) Business loss decreased.....	\$1,476.98	
(b) Net loss from sale or exchange of capital assets	1,064.84	
(c) Partnership loss decreased	1,028.51	3,570.33
		<hr/>
Net income adjusted.....	\$35,369.54	

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that a loss of \$17,250.70 was sustained from operation of your business, instead of \$18,727.68 as claimed in your return, a decrease of \$1,476.98, representing disallowance, under the provisions of section 23(1) of the Internal Revenue Code, of depreciation claimed on personal residence and furnishings.

(b) It has been determined that a net gain of \$64.84 was realized from the sale or exchange of capital assets, in lieu of a net loss of \$2,435.16 as disclosed in your return, the deduction for which was limited, under the provisions of section 117(d) of the Internal

Exhibit "A"—(Continued)

Revenue Code, to \$1,000.00 in this taxable year. The amount of \$1,064.84 (\$64.84 plus \$1,000.00 deducted) is accordingly added to your income. The net gain of \$64.84 is computed as follows:

Net loss from sale or exchange of capital assets as dis-
closed by return (50% of \$4,870.33).....\$2,435.16

Add: Non-business bad debt of \$5,000.00 disallowed due to
lack of substantiation that it became worthless in this
taxable year, 50% of which was taken into account..... 2,500.00

Net gain from sale or exchange of capital assets, as de-
termined\$ 64.84

(c) Your distributive share of an operating loss sustained by the partnership, Binglin Stock Farms, Ltd., has been determined in the amount of \$28,332.46 instead of \$29,360.97 as claimed in your return. The excessive amount claimed, or \$1,028.51, is disallowed.

There is allowed, under the provisions of section 131 of the Internal Revenue Code, a credit of \$287.29 for income tax paid to a foreign country, not previously claimed in your return.

COMPUTATION OF ALTERNATIVE TAX

Taxable Year Ended December 31, 1945

Net income adjusted.....\$35,369.54

Less: Excess of net long-term capital gain over net short-
term capital loss 64.84

Ordinary net income\$35,304.70

Less: Surtax exemptions 1,500.00

Balance (surtax net income).....\$33,804.70

Surtax on \$33,804.70.....\$15,633.06

Ordinary net income.....\$35,304.70

Less: Normal tax exemption..... 500.00

Balance subject ot normal tax.....\$34,804.70

Normal tax (3% of \$34,804.70)..... 1,044.14

Partial tax\$16,677.20

Plus: 50% of \$64.84..... 32.42

Alternative tax\$16,709.62

Exhibit "A"—(Continued)

COMPUTATION OF TAX

Taxable Year Ended December 31, 1945

Net income adjusted.....	\$35,369.54	
Less: Surtax exemptions	1,500.00	
Surtax net income	\$33,869.54	
Surtax		\$15,675.20
Net income adjusted	\$35,369.54	
Less: Normal-tax exemption	500.00	
Net income subject to normal tax.....	\$34,869.54	
Normal tax at 3%		1,046.09
Total normal tax and surtax.....	\$16,721.29	
Alternative tax	\$16,709.62	
Less: Income tax paid to a foreign country.....	287.29	
Correct income tax liability.....	\$16,422.33	
Income tax liability shown on return, account No. 3048768	14,344.49	
Deficiency of income tax.....	\$ 2,077.84	

Received and Filed T.C.U.S. Nov. 1, 1948.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition except that it is denied that the return for 1943 was filed with the Collector for the Sixth District of California.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income and victory taxes for the calendar year 1943 and income taxes for the years 1944 and 1945 as alleged in paragraph 3 of the petition and denies the remaining allegations contained in said paragraph.

4. (a) and (b). Denies all the allegations of error contained in paragraph 4 of the petition.

5. (a) to (f), inclusive. Denies the allegations of fact contained in subparagraphs (a) to (f), inclusive, of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. C. CROUTER,
H. A. MELVILLE,
Special Attorneys,
Bureau of Internal Revenue.

Received and Filed T.C.U.S. Dec. 8, 1948.

[Title of Tax Court and Cause.]

REQUEST FOR DESIGNATION OF PLACE OF HEARING

Now comes the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and in accordance with Rule 26 of the Court's Rules of Practice.

Requests that the Court designate that the hearing in the above-entitled proceeding be held at Los Angeles, California, or vicinity, in order to afford the respective parties an opportunity to produce evidence at the trial with a minimum expense.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
E. C. CROUTER,
H. A. MELVILLE,
Special Attorneys,
Bureau of Internal Revenue. [5]

Received and Filed T.C.U.S. Dec. 8, 1948.

[Title of Tax Court and Cause.]

NOTICE OF PLACE OF HEARING

Notice is hereby given that the above entitled proceeding has been placed upon the Los Angeles, Calif., calendar of the Court for hearing on the merits in

due course either in the city named or in the vicinity thereof.

This notice refers only to the place of hearing and not to the time. The parties will be notified in due course of the exact time and place of hearing on the merits.

If either party desires that the hearing on the merits be held at some place other than the place above named, he must so notify the Court within 30 days from the date of this notice, and name the place he prefers. The Court will consider any requests filed as above provided, and if it decides that the place of hearing should be changed, it will so notify the parties.

Service of answer and request is hereby made.

Dated: December 9, 1948.

[Signed] /s/ VICTOR J. MERSCH,
Clerk.

To: A. Calder Mackay, Esq.

[6]

[Title of Tax Court and Cause.]

NOTICE OF SETTING PROCEEDING FOR HEARING—CIRCUIT CALENDAR

Take Notice that a Division of The Tax Court of the United States will sit in Room 229, U. S. Post Office and Court House, Los Angeles, Calif., beginning June 26, 1950.

Hearings will be held in all proceedings shown on the attached list. The list will be called **promptly** at 10:00 a.m., as indicated, and you will be expected

to answer the call at that time and be prepared for trial when reached. No continuance will be granted except for extraordinary cause. Failure to appear will be taken for cause for dismissal in accordance with the Rules of Practice, and you are in all other respects expected to be familiar with such rules.

Dated: April 27, 1950.

Respectfully,

/s/ VICTOR J. MERSCH,
Clerk.

To: A. Calder Mackay, Esq.

[7]

The Tax Court of the United States

Docket No. 23168

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated March 31, 1949, and as a basis of his proceeding alleges as follows:

1. Petitioner is an individual residing at 1230 Benedict Canyon Drive, Beverly Hills, California. The return for the period involved was filed with the Collector of the Sixth District of California.

2. The notice of deficiency (a copy of which is

attached and marked "Exhibit A") was mailed to the petitioner on March 31, 1949.

3. The taxes in controversy are income taxes for the calendar year 1946 in the sum of \$5,185.25.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in disallowing deductions for legal fees and expenses paid by petitioner [8] during the taxable year 1946 in the amount of \$5,393.01.

(b) The Commissioner erred in disallowing a depreciation deduction for the year 1946 in the amount of \$1,496.55.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) In the year 1938 petitioner and his then wife, Anita Z. Howard, entered into a property settlement agreement. Shortly thereafter Anita Z. Howard obtained a divorce from petitioner in the State of Nevada, the decree of divorce incorporating therein said property settlement agreement. In accordance with the terms of that agreement, petitioner paid his former wife \$1,250.00 per month until January 1, 1942. The agreement required such monthly payments to be made until the remarriage of Anita Z. Howard.

(b) Subsequent to January 1, 1942, petitioner discontinued said monthly payments, as a result of which Anita Z. Howard commenced an action against petitioner in the Superior Court in and for the County of San Francisco, California, for the pur-

pose of establishing the Nevada decree as a judgment of the State of California and to recover sums due under the property settlement agreement incorporated therein.

(c) Petitioner filed an answer and a cross complaint in said action, alleging that (1) the obligation to make monthly payments had been terminated by reason of a subsequent Mexican common law marriage of Anita Z. Howard, and (2) the property settlement agreement had been procured by the fraud of Anita Z. Howard. Judgment in that proceeding after prolonged litigation, ultimately was rendered in favor of Anita Z. Howard. See *Howard vs. Howard*, 157 Pac. (2d) 874, 161 Pac. (2d) 681, and 163 Pac. (2d) 439.

(d) For attorneys' fees, costs and expenses in the proceedings referred to above, the petitioner paid the amount of \$5,393.01 during the tax year 1946. Petitioner is informed and believes that said amount is deductible from gross income under the provisions of Section 23 (a) of the Internal Revenue Code and that the Commissioner's disallowance thereof is erroneous and illegal.

(e) During the year 1946 sundry assets owned by petitioner in connection with his ranch (to-wit, a manager's house, furniture and linens) sustained depreciation in the amount of \$1,496.55. Petitioner is informed and believes that such depreciation is allowable as a deduction under the Internal Revenue Code and that the Commissioner's disallowance thereof is erroneous and illegal.

Wherefore, petitioner prays that this Court may

hear the proceeding and determine that the Commissioner erred in the particulars hereinabove set forth and grant to the petitioner such other and further relief, including refunds, as to it seems just and proper in the premises.

Dated May 13th, 1949.

Respectfully submitted,

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Counsel for Petitioner.

Of Counsel:

/s/ NEIL S. McCARATHY

State of California,
County of Los Angeles—ss.

Lindsay C. Howard, being first duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except the matters which are therein stated to be upon information and belief, and that as to those matters he believes it to be true.

/s/ LINDSAY C. HOWARD

Subscribed and sworn to before me this 9th day of May, 1949.

[Seal] /s/ JOHN S. HOWARD,

Notary Public in and for said County and States.

My Commission expires Sept. 15, 1951.

EXHIBIT "A"

Treasury Department, Internal Revenue Service
417 So. Hill St., Los Angeles 13, Calif.

Office of Internal Revenue Agent in Charge

Los Angeles Division

LA:IT:90D:LHP

March 31, 1949

Mr. Lindsay C. Howard

1230 Benedict Canyon Drive

Beverly Hills, California

Dear Mr. Howard:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1946 discloses a deficiency of \$5,185.25, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assess-

Exhibit "A"—(Continued)

ment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner,

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in
Charge.

Enclosures: Statement, Form of waiver.

STATEMENT

LA:IT:90D:LHP

Mr. Lindsay C. Howard
1230 Benedict Canyon Drive
Beverly Hills, California

TAX LIABILITY FOR THE TAXABLE YEAR ENDED
DECEMBER 31, 1946

	Deficiency
Income tax	\$5,185.25

In making this determination of your income tax liability careful consideration has been given to the report of examination dated November 17, 1948.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$77,582.23	
Unallowable deductions:		
(a) Depreciation	\$1,496.55	
(b) Legal expense	5,393.01	6,889.56
	<hr/>	<hr/>
Net income adjusted.....		\$84,471.79

Exhibit "A"—(Continued)

EXPLANATION OF ADJUSTMENTS

(a) The deduction of \$10,221.09 claimed for depreciation on ranch equipment is disallowed to the extent of \$1,496.55, representing depreciation on your personal residence and furnishings. Such amount constitutes a personal expense and is not deductible. Section 24(a)(1), Internal Revenue Code.

(b) The deduction of \$5,393.01 claimed for legal expense incurred in connection with settlement of alimony suit is disallowed as representing a personal expense. Section 24(a)(1), Internal Revenue Code.

COMPUTATION OF ALTERNATIVE TAX

Net income adjusted	\$84,471.79
Less: Excess of net long-term capital gain over net short-term capital loss	10,161.78
Ordinary net income	\$74,310.01
Less: Exemptions	1,500.00
Balance, subject to surtax and normal tax.....	\$72,810.01
Tentative surtax	\$42,211.81
Tentative normal tax.....	2,184.30
Total tentative tax	\$44,396.11
Less 5%	2,219.81
Partial tax	\$42,176.30
Plus: 50% of \$10,161.78.....	5,080.89
Alternative tax	\$47,257.19

COMPUTATION OF TAX

Net income adjusted.....	\$84,471.79
Less: Exemptions	1,500.00
Balance, subject to surtax and normal tax....	\$82,971.79
Tentative surtax	\$50,227.15
Tentative normal tax at 3%.....	2,489.15
Total tentative tax	\$52,716.30
Less 5%	2,635.82
Total normal tax and surtax.....	\$50,080.48

Exhibit "A"—(Continued)

Computation of Tax—(Continued)

Alternative tax	\$47,257.19
Less: Credit for tax paid to a foreign country.....	122.46
<hr/>	
Correct income tax liability.....	\$47,134.73
Income tax liability shown on return, account No. 9123450	41,949.48
<hr/>	
Deficiency of income tax.....	\$ 5,185.25

Received and Filed T.C.U.S. May 18, 1949.

[Title of Tax Court and Cause No. 23168.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4 (a) and (b). Denies that the respondent erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5 (a) to (e). Denies the allegations contained in Sub paragraphs (a) to (e) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT, ECC
Chief Council,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
H. A. MELVILLE,
Special Attorneys,
Bureau of Internal Revenue.

[9]

Received and Filed T.C.U.S. July 5, 1949.

[Title of Tax Court and Cause No. 23168.]

REQUEST FOR DESIGNATION OF PLACE OF HEARING

Now comes the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and in accordance with Rule 26 of the Court's Rules of Practice.

Requests that the Court designate that the hearing in the above-entitled proceeding be held at Los Angeles, California, or vicinity, in order to afford

the respective parties an opportunity to produce evidence at the trial with a minimum expense.

/s/ CHARLES OLIPHANT, ECC

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,

E. C. CROUTER,

H. A. MELVILLE,

Special Attorneys,

Bureau of Internal Revenue.

[10]

Received and Filed T.C.U.S. July 5, 1949.

[Title of Tax Court and Cause No. 23168.]

NOTICE OF PLACE OF HEARING

Notice is hereby given that the above entitled proceeding has been placed upon the Los Angeles, Calif., calendar of the Court for hearing on the merits in due course either in the city named or in the vicinity thereof.

This notice refers only to the place of hearing and not to the time. The parties will be notified in due course of the exact time and place of hearing on the merits.

If either party desires that the hearing on the merits be held at some place other than the place above named, he must so notify the Court within 30 days from the date of this notice, and name the place he prefers. The Court will consider any requests filed as above provided, and if it decides that the

place of hearing should be changed, it will so notify the parties.

Service of answer and request is hereby made.

Dated: July 11, 1949.

/s/ VICTOR J. MERSCH,

Clerk.

To: A. Calder Mackay, Esq.

[11]

[Title of Tax Court and Cause No. 23168.]

NOTICE OF SETTING PROCEEDING FOR
HEARING—CIRCUIT CALENDAR

Take Notice that a Division of The Tax Court of the United States will sit in Room 229, U. S. Post Office and Court House, Los Angeles, Calif., beginning June 26, 1950.

Hearings will be held in all proceedings shown on the attached list. The list will be called promptly at 10:00 a.m., as indicated, and you will be expected to answer the call at that time and be prepared for trial when reached. No continuance will be granted except for extraordinary cause. Failure to appear will be taken for cause for dismissal in accordance with the Rules of Practice, and you are in all other respects expected to be familiar with such rules.

Dated: April 27, 1950.

Respectfully,

/s/ VICTOR J. MERSCH,

Clerk.

To: A. Calder Mackay, Esq.

[12]

The Tax Court of the United States

MINUTES OF PROCEEDINGS

Date: July 13, 1950. Place: Los Angeles, Calif.
Docket Nos. 20860-23168.

Proceeding: Lindsay C. Howard.

Assigned to: Judge Ernest H. Van Fossan, Division No. 9.

Counsel for Petitioner: A. Calder Mackay, Esq.,
and Adam Y. Bennion, Esq., 728 Pacific Mutual
Bldg., 523 West Sixth St., Los Angeles 14, Calif.

Counsel for Respondent: H. A. Melville, Esq.

Stenographic Reporter: Dorothy Clark.

Hearing: 9:30 - 10:05 a.m. Sub.

Transcript Ordered: Yes.

On the merits: Yes.

Filed at hearing: Stipulation of Facts.

Petitioner's brief: August 28, 1950. Respondent's
brief: August 28, 1950. Replies: September 12, 1950.

Witness for Petitioner: Lindsay C. Howard.

Respondent's Exhibits: "A" Income Tax Return
—1943; "B" Income Tax Return—1944; "C" In-
come Tax Return—1945; "D" Income Tax Return
—1946.

/s/ MARY Y. ROBERTS,
Acting Deputy Clerk.

[13]

[Title of Tax Court and Causes Nos. 20860-23168.]

STIPULATION OF FACTS

It is hereby stipulated by and between the parties in the above entitled proceedings, through their respective counsel, as follows:

1. Petitioner and Anita Z. Howard were married in 1925. On August 23, 1938, the executed a property settlement agreement, a copy of which is attached hereto, marked Exhibit 1-A, and made a part hereof. On November 5, 1938, petitioner and Anita Z. Howard were divorced by a decree of the Second Judicial District Court of the State of Nevada in and for the County of Washoe, a copy of which is attached hereto, marked Exhibit 2-B, and made a part hereof.

2. Petitioner made the payments to Anita Z. Howard of \$1,250.00 per month, as specified in said property settlement agreement, from August 1938 through the calendar year 1941, and then discontinued said payments.

3. Thereupon, Anita Z. Howard commenced an action against petitioner in the Superior Court of the State of California in and for the City and County of San Francisco, to recover the monthly payments alleged to be due her under [14] the terms of said property settlement agreement, and praying that the Nevada decree be established as a foreign judgment and enforced by order of the California court.

4. Petitioner filed an "Answer and Cross-Complaint" in said action, denying liability upon two grounds:

(a) That Anita Z. Howard had remarried and hence his obligation to make monthly pay-

ments had terminated under the terms of the property settlement agreement; and

(b) That the property settlement agreement was null and void, having been procured by the fraud and deceit of said Anita Z. Howard, in that during their married life and prior to the execution of said agreement she had represented to petitioner that she had been a virtuous woman of good moral character and a faithful wife, whereas in truth and fact for four years prior to the execution of said agreement she had been an adulterous woman and an unfaithful wife to the plaintiff, unbeknownst to him.

Said cross-complaint prayed for the cancellation and annulment of said property settlement agreement and that portion of the decree of the Nevada court which purported to approve and adopt the same.

5. Anita Z. Howard filed a demurrer to said Answer and Cross-Complaint, which was sustained by the Superior Court. Said decision was reversed by the District Court of Appeal, First District, Division 2, California, on April 24, 1945, in *Howard vs. Howard*, 157 P. (2d) 874; but was affirmed by the Supreme Court of California on November 27, 1945, in *Howard vs. Howard*, 163 P. (2d) 439. Said opinions by the District Court of Appeal and the Supreme Court of California, and the facts set forth therein, are hereby incorporated herein by this reference and made a part hereof.

6. Petitioner was commissioned a Captain in the United States Army on or about April 27, 1942. On

or about November 20, 1943, a General Court Martial was appointed to try petitioner on a charge of violating the 95th Article of War, the specification of alleged violation being that he—

“* * * did, without due cause, from about 1 January 1942, to about 17 November 1943, dishonorably fail, refuse, and neglect to pay to Anita Zabala Howard (divorced wife of said Captain Lindsay C. Howard, the sum of One Thousand Two Hundred Fifty (\$1,250.00) Dollars per month as and for the support of said Anita Zabala Howard, which sum the said Captain Lindsay C. Howard was ordered to pay by a valid decree, dated 5 November 1938, rendered by a court of competent jurisdiction in the case of Anita Zabala Howard, Plaintiff, versus Lindsay C. Howard, Defendant, same being Cause No. 60623, in the Second Judicial District Court of the state of Nevada, in and for the County of Washoe, Nevada.”

Said General Court Martial tried the case on December 13 and 14, 1943, and on the latter date petitioner was found not guilty and was acquitted of the specification and the charge.

7. As attorneys' fees, expenses and court costs in said court martial proceedings and in said litigation in the Superior Court, District Court of Appeal and Supreme Court of California, petitioner paid the following amounts:

1943

Date of Check	To Whom Issued	Check No.	Amount
2-23-43	Hart & Hart.....	7737	\$ 52.00
3-16-43	Walter McGovern	7761	197.00
5- 5-43	Williams & Williams.....	7790	25.00
5-17-43	Hart & Hart (Shorthand, etc. In re: deposition)	7804	13.09
6-17-43	Walter McGovern	7830	63.75
8- 5-43	Baker, Selby & Ravenel (Attorneys in Washington)	7855	522.80
9-14-43	Walter McGovern	7890	5,000.00
12- 7-43	Walter McGovern (Service of Edward Bergner)	7984	79.50
12-13-43	Walter McGovern (Disbursements— Howard vs. Howard).....	7991	489.34
12-16-43	Walter McGovern (Expense of Howard vs. Howard).....	7995	525.43
12-23-43	Walter McGovern	8004	50.00
12-29-43	Walter McGovern	8013	3,000.00
			<hr/> \$10,017.91

1944

Date of Check	To Whom Issued	Check No.	Amount
1- 4-44	Walter McGovern	8017	\$ 253.73
2- 1-44	Walter McGovern	8036	195.75
3-27-44	Crocker 1st Nat'l Bank (In re: Howard vs. Howard)	8069	150.00
3-31-44	Gus Ringole	8074	2,550.00
4- 3-44	Otton J. Bauer (Howard vs. Howard —Transcript on Appeal)	8078	265.00
4- 3-44	Walter McGovern (Telephone— Howard vs. Howard).....	8077	31.26
5- 3-44	Notary Fee	Petty Cash	.50
5- 4-44	Fee to file Revocation of Power of Attorney No. 8092.....	\$10.00	
	Refund	7.00	3.00
6-12-44	Notary fees	8110	2.00
			<hr/> \$3,451.24

1946

Date of Check	To Whom Issued	Check No.	Amount
	Walter McGovern		\$ 5,000.00
	Printing petition for rehearing.....		92.21
	Costs in trial court.....		196.80
	Costs on appeal.....		100.00
	Release of attachment.....		2.00
	Recording satisfaction of judgment.....		2.00
			<hr/>
			\$ 5,393.01

The parties do not intend by this paragraph to allocate any of said fees, expenses and costs as between said court martial proceedings and said litigation.

Dated July 12, 1950.

/s/ A. CALDER MACKAY,

/s/ ADAM Y. BENNION,
Counsel for Petitioner.

/s/ CHARLES OLIPHANT,

Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

EXHIBIT 1-A

PROPERTY SETTLEMENT AGREEMENT

This Agreement made and entered into, in duplicate, this 23rd day of August 1938, at San Francisco, California, by and between Anita Z. Howard, First Party, and Lindsay C. Howard, Second Party,

Witnesseth

That Whereas, said parties hereto intermarried on

Exhibit 1-A—(Continued)

the 1st day of June, 1925, and ever since have been and now are husband and wife; and

Whereas, certain differences have arisen between them which are irreconcilable and they have been since February 6th, 1937, and now are, living separate and apart; and

Whereas, said parties now desire to settle permanently their respective property rights; and

Whereas, there are three minor children, the issue of said marriage, to-wit: Mary Lynette Howard, of the age of twelve (12) years, Lindsay Coleman Howard, Jr. of the age of eleven (11) years and Peter Stewart Howard, of the age of six (6) years; all of said children being now in the care and custody of the said first party; and

Whereas, said parties hereto desire, in addition to settling and determining their respective property rights, to provide for the care and custody and maintenance and education of said minor children, and each party hereto hereby acknowledges that she (he) is acting under the advice and direction of his (her) respective attorneys and prior to the entering into of this agreement each has had a complete and full understanding of all matters relating to their respective property and property rights and marital status and their respective claims thereto and thereunder; and

Whereas, since the separation of the said parties hereto Messrs. Cooper, White & Cooper have continuously since February, 1937, acted as attorneys for said first party, and have attempted together

Exhibit 1-A—(Continued)

with the attorney for said second party to effect a reconciliation between the parties, and have negotiated and consummated this settlement of their property rights and have prepared this agreement, and have received no compensation whatever therefor,

Now, Therefore, in order to effect a full and complete settlement for all time as between them of matters and things relating to the property, property rights, claims and demands of each against the other, and the claims and demands of the first party for support, maintenance or alimony and for the support, maintenance, care and education of their said minor children, It Is Hereby Mutually Agreed:

1. That the said three minor children of the parties hereto shall remain in the care and custody and control of both parties as hereinafter provided.

2. That the second party shall be entitled to have Mary Lynette Howard and Lindsay Coleman Howard, Jr., with him for one-half of the time, and Peter Stewart Howard with him for one-half of the said minor child's vacation period, and each party shall be entitled in addition to see and visit said children at all reasonable times when with the other.

3. That all of the property of the second party has been and is his separate property and that at no time during the coverture has there been any community property or property jointly owned, except household furniture and silverware received as wedding gifts.

That the first party and her counsel are fully advised that the income of the second party is derived

Exhibit 1-A—(Continued)

in large measure from the automobile industry, that they have had access to his accounts and records and are informed as to the past and present income and that the provisions hereinafter made for the support and maintenance of the first party and their children are made advisedly and with full knowledge that the income of said second party is subject to extreme fluctuation.

4. That the second party hereto hereby undertakes and solemnly promises and agrees to pay to said first party during her natural life, or until she remarries, a monthly sum of \$1,250.00 payable on the first day of each and every month commencing August 1st, 1938, which sum shall be for the use and benefit of said first party in the maintenance of herself and all said minor children while actually living with her and from which she shall bear and pay the board of said three minor children and the rental of a home or residence or apartment for herself and said minor children and the nurse to be furnished by said second party as hereinafter set forth for the benefit of said minor child, Peter, and she shall pay the room and board of said nurse and her son Peter's board until he goes to boarding school when his board shall be governed by the provisions of Paragraph 6 hereof, and said first party shall also pay all her personal expenses of every kind and nature. It being expressly understood that said monthly payments shall not be diminished during her natural life unless she shall remarry, even though the said children, or

Exhibit 1-A—(Continued)

any thereof, shall not be with her, or the nurse mentioned shall not be furnished or be no longer necessary, but the understanding and agreement of second party is and is intended to be absolute for the payment of said monthly sums to first party during the natural life of said first party until and unless only she remarries.

5. That said second party agrees to furnish a nurse for said son, Peter, until he arrives at the age where the services of such nurse are not necessary, and said second party agrees to pay the salary of said nurse during such period, and of any successor or successors of said nurse in the performance of said services.

6. That in addition to the foregoing, said second party agrees to pay for the schooling and board while at school and education of all said minor children including expenses, travelling and otherwise, in attending school and at all times during their respective minorities to pay for their clothes and to furnish them reasonable pocket money and to pay all bills and charges for medical and surgical and dental and hospital care.

That in regard to the schooling of said children, and the particular schools which they shall attend, the same shall be determined from time to time by the parties hereto, and in the event of a disagreement, the decision of Charles S. Howard, the father-in-law of first party, and the father of second party, shall be determinative of the question and bind both parties hereto.

Exhibit 1-A—(Continued)

7. It is further expressly understood and agreed that said second party shall pay all unpaid bills incurred by said first party up to June 1st, 1937, of every kind, and all unpaid bills for the direct benefit and support of said children since said time to the date of this agreement, but shall not be called upon to pay any unpaid personal bills of first party incurred by her between June 1st, 1937 and May 1st, 1938, but said second party agrees in addition to pay the personal bills of first party in the sum of \$1,156.00 incurred by her since May 1st, 1938, and said first party warrants that her personal unpaid bills incurred since May 1st, 1938, will not exceed the said sum of \$1,156.00, and if they do, first party shall exclusively bear and pay the excess.

8. That the said parties hereto hereby agree to make a fair division between them of the furniture, furnishings and personal effects and other personal property now contained in the residence at No. 1200 Easton Drive, Burlingame, California, and each party shall own as her (his) absolute separate property that portion awarded to her (him), and in the event of any disagreement between the parties hereto as to the portion of said property which each shall take, the matter shall be referred to said Charles S. Howard who shall make such division as he deems just and both parties agree to abide by his decision in the premises.

9. That said first party agrees in consideration of the execution of this agreement by second party, to execute and deliver to said second party a Deed

Exhibit 1-A—(Continued)

granting and conveying unto said second party absolutely and forever the said home and premises at No. 1200 Easton Drive, Burlingame, California, and all other property now in the name or possession of said second party, without reservation of any kind.

10. Said first party further agrees that she will not hereafter for her own personal use or benefit charge any bills of any kind against second party, or involve second party's credit in any manner, and agrees to pay for all domestic and other help hired by her, other than the nurse mentioned herein, and for all merchandise and other supplies furnished her.

11. Said second party agrees to pay said attorneys, Cooper, White & Cooper, for their legal services rendered to said first party, and it is expressly understood and agreed that said second party shall not be called upon for any further payment for legal services whatsoever, and in the event action of divorce shall hereafter be instituted or commenced by said first party against said second party, or by said second party against said first party, the first party shall, in any such action, bear and pay her own attorneys fees and costs thereinabout and she will not ask or demand from said second party any counsel fees or costs whatsoever in the premises.

12. That in the event of any divorce being granted to either party hereto at any time hereafter, and the subsequent remarriage of said first party, and not before, or otherwise, the payment of said \$1,250.00 per month shall immediately and absolutely terminate upon such remarriage, but second party agrees to con-

Exhibit 1-A—(Continued)

tinue to provide for, support and educate said minor children and further agrees that after the remarriage of first party, second party will pay to first party the sum of Seventy-five Dollars (\$75.00) per month for the room and board of each of said minor children when living with or visiting said first party.

13. In the event that a decree of divorce should be granted to either party hereto it is hereby agreed that neither party will ask or accept any provision in said decree of divorce so granted in respect to division of income or property of the parties hereto or to the support of either party hereto which shall change, modify, increase or decrease the obligations or rights of the respective parties as herein set forth; but in any decree of divorce, interlocutory and/or final, hereafter granted, this agreement may be filed in said action and made a part of said decree or decrees and confirmed and approved thereby and said court may command and decree the payments thereunder and the performance thereof by the respective parties and retain jurisdiction at all times for the enforcement thereof by all legal process.

14. This agreement is made at San Francisco, California, and is to be construed according to the laws of the State of California, and may be enforced by all lawful means in this State and elsewhere where the parties may be found.

15. In consideration of the mutual promises herein set forth, expressly subject to all rights hereunder, said parties hereto do hereby release, quitclaim and assign one to the other any and all interest of each

Exhibit 1-A—(Continued)

and every kind which either has or to which either might succeed in and to their respective separate properties.

16. It is further agreed by and between the parties hereto that from and after the date of this agreement, all income or property of any kind acquired by either of the parties hereto shall be the separate property of the person so acquiring said income or property.

17. It is the intention and purpose of the foregoing Paragraph 13 that from and after the date of this agreement the parties hereto shall not have any right, title and interest either as heir at law, husband or wife, in and to the property of the other, save and except of course as in this agreement provided. Said respective parties hereto expressly reserve all their rights hereunder and all lawful means of enforcing the same against the property of the other.

18. It is further agreed that no one of said three minor children of the said parties hereto shall be removed from the State of California without the written consent of both parties.

19. In consideration of the foregoing, and subject to all the provisions hereof, and except as otherwise herein provided, said first party does hereby release and forever discharge second party of and from any and all claims and demands which she now has or may or might hereafter have against said second party from any and all claims upon the separate property of said second party, other than

Exhibit 1-A—(Continued)

her claims hereunder, and each party does hereby relinquish and renounce now and forever any right or interest by succession, heirship or otherwise in or to any property whatsoever of the other (except of course as herein provided) including the right to act as executor or administrator of the estate of the other and each party does covenant and agree with the other that he (she) will not at any time hereafter assert any right, title or interest as husband or wife or heir to the property of the other, except as to the rights conferred by this agreement.

20. This agreement shall be and become effective as of the date of the execution hereof, and shall bind and benefit the parties hereto and their respective heirs, legatees, devisees and personal representatives and this agreement is acknowledged by each of the parties hereto to be supported by proper, sufficient and equitable consideration, and in the event of any divorce between them at any time, the court granting the same is requested to approve and ratify this agreement and to order and decree all payments to be made hereunder and the performance of all provisions hereof to the full extent that the law may permit.

21. Each party hereto agrees, on request of the other, to execute and deliver to the other such further instruments and conveyances as may be necessary or proper to fully carry out and effectuate the objects, purposes and provisions of this agreement.

In Witness Whereof, the parties hereto have here-

Exhibit 1-A—(Continued)

unto set their hands, in duplicate, the day and year first above written.

/s/ ANITA Z. HOWARD,
First Party.

/s/ LINDSAY C. HOWARD,
Second Party.

Witness to the signature of first party:

COOPER, WHITE & COOPER,
By /s/ SHELDON G. COOPER,
Attorneys for First Party.

Witness to the signature of second party:

/s/ JOHN FRANCIS NEYLAN,
Attorney for Second Party.

EXHIBIT 2-B

In the Second Judicial District Court of the State of
Nevada in and for the County of Washoe

No. 60623—Dept. No. 1

ANITA ZABALA HOWARD,

Plaintiff,

vs.

LINDSAY C. HOWARD,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECREE

This cause having come on regularly for trial before this Court the twenty-first day of October, 1938,

Exhibit 2-B—(Continued)

the plaintiff appearing personally and by her attorneys, Price and Merrill. The defendant having entered a general appearance in the action and being represented in Court by his attorney, William M. Kearney; evidence having been presented in support of the allegations of the complaint and the matter having this day been submitted to this Court; this Court, after duly considering the evidence and the files in this action, finds that all of the allegations of the complaint are true and that the defendant has been guilty of wilful desertion of the plaintiff for a period of more than one year prior to the date of commencement of this action.

As conclusions of law the Court finds that the plaintiff is entitled to an absolute and final decree of divorce from the defendant upon the ground of desertion; and is entitled to the approval and adoption and a decree and order of enforcement of that certain written agreement entered into by and between the plaintiff and the defendant dated August 23, 1938, mentioned in the plaintiff's complaint, a copy of which was introduced in evidence and marked "Plaintiff's Exhibit A" and is now before the Court.

It is Therefore Hereby Ordered, Adjudged and Decreed that the plaintiff be and she hereby is granted a decree of divorce, final and absolute in form and effect, from the bonds of matrimony now and heretofore existing between the plaintiff and the defendant, and restoring said parties to the status of unmarried persons.

Exhibit 2-B—(Continued)

It Is Further Ordered, Adjudged and Decreed that that certain written agreement made and entered into by and between the plaintiff and the defendant under date of August 23, 1938, a copy of which was introduced in evidence in this case and marked "Plaintiff's Exhibit A" and is now before this Court, be and it is hereby expressly made a part of this decree as though fully set forth word for word herein, and the same is approved and ratified and adopted by this Court in its entirety, and performance thereof by both the plaintiff and the defendant as agreed by them therein respectively is hereby expressly ordered and adjudged and is hereby made a mandate of the Court enforceable by all the lawful powers and process thereof.

Done in Open Court this fifth day of November, 1938.

A. J. MAESTRETTI,
District Judge.

[Endorsed]: Filed 1938 Nov. 5 p.m. 12:15. E. H. Beener, Clerk. By B. Ellsworth, Deputy.

Filed T.C.U.S. July 13, 1950.

The Tax Court of the United States

Docket Nos. 20860 - 23168

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Court Room No. 229, United States Post Office and
Court House Bldg., Los Angeles, Calif.

Thursday, July 13, 1950—9:30 a.m.

(Met pursuant to notice.)

Before: Honorable Ernest H. Van Fossan, Judge.

Appearances:

A. Calder MacKay and Adam Y. Bennion, appearing for Petitioner.

H. A. Melville, (Hono. Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [1*]

PROCEEDINGS

The Clerk: Docket Numbers 20860 and 23168, Lindsay C. Howard.

The Court: I understand from counsel this case will take at most a half hour. We will proceed with this case at this time.

The Clerk: State your appearances, please.

* Page numbering appearing at top of page of original certified Reporter's Transcript.

Mr. Bennion: A. Calder Mackay and Adam Y. Bennion.

Mr. Melville: H. A. Melville.

Mr. Bennion: If your Honor please, the taxes in this case are income tax for four years, 1943 through 1946, in the aggregate amount of a little in excess of \$15,000. There are two questions involved.

The first is whether or not the Commissioner erred in disallowing certain attorneys' fees and expenses and costs incurred in certain legal proceedings which I shall briefly discuss.

The Petitioners, Lindsay C. Howard and Anita Z. Howard, were married in 1925. In 1938 they executed a property settlement agreement under the terms of which Petitioner agreed to pay Mrs. Howard the sum of \$1,250 per month until he remarriage. A few weeks later the parties were divorced and the separation agreement—property settlement agreement, that is—was incorporated and approved in the decree of divorce. [3]

The payments under the contract were made by the Petitioner for 1938 through the year 1941, at which time the payments were discontinued. Shortly thereafter Anita Z. Howard brought an action in the Superior Court of California against the Petitioner for the monthly sums due. The Petitioner filed an answer and cross-complaint in that proceeding alleging that his obligation had terminated on two grounds: first, that Anita Z. Howard had remarried in the meantime, and that the initial property settlement agreement was obtained by fraud of Anita Z. Howard. That proceeding consumed several years,

and finally the Superior Court sustained the demurrer of Anita Z. Howard and ruled in her favor.

That decision was reversed by the District Court of Appeal of California, and subsequently the Supreme Court of California reversed the District Court of Appeals and affirmed this Superior Court so that Anita Z. Howard finally prevailed in the action.

During the course of the action Anita Z. Howard, through her attorneys, took the matter up with the War Department. The Petitioner had become a Captain in the United States Army. Court-martial proceedings were instituted against him charging a violation of the 95th Article of War in that he had failed to pay the monthly payments in accordance with the Nevada divorce decree. The court-martial proceedings were very bitterly contested, and after a hearing Petitioner was [4] acquitted and found not guilty of the charge.

As attorneys' fees in these two proceedings the Petitioner paid certain sums which we have stipulated in a stipulation of facts, and he also paid certain court costs and expenses. The Petitioner maintains in this case that these payments, the attorneys' fees and the expenses and court costs, were deductible either as ordinary and necessary business expense or as expenses incurred in the production or collection of income or in the management conservation or maintenance of property held for the production of income.

In two cases—no doubt your Honor will recall—reviewed by the Court, the Tax Court recently held that the attorney fees incurred by a divorced wife in

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In two cases—no doubt your Honor will recall—reviewed by the Court, the Tax Court recently held that the attorney fees incurred by a divorced wife in

order to secure alimony or increase alimony constituted deductible expenses; and in the course of those opinions the Court very clearly held that such expenses were not personal in that there was no issue about the family or marital relationship, that having been terminated by the divorce.

Similarly in this case there was no question in these proceedings with respect to the divorce itself, and the Petitioner maintains that the expenses of this character are no more than personal insofar as the husband is concerned than they were in the case of the divorced wife.

The Tax Court has also held that expenses paid to retain income are deductible equally as well as expenses paid [5] to produce income in the first instance, and we believe that that situation obtains here.

The second issue has to do with depreciation on a house and furnishings on the Petitioner's ranch. The notice of deficiency disallowed the depreciation that was claimed on these items on the ground this constituted a personal residence of the Petitioner, and the Petitioner challenges that termination; and we believe the evidence will show that the house is not his personal residence. Those are the issues before the Court.

The Court: Do you wish to state for the Government?

Mr. Melville: Mr. Bennion has quite thoroughly covered the points, your Honor. I just wish to elaborate a little bit. The court-martial proceeding—while the Captain was acquitted of the charge, it is not to be understood from that that he was held not respon-

sible and liable for the payment of the alimony, the charge being conduct unbecoming to an officer and a gentleman; and by the court-martial proceeding they simply held that his conduct was not unbecoming to an officer and a gentleman. He was simply asserting his legal rights to contest his liability to pay the alimony which the civil courts held he was required to pay.

The two recent cases which Mr. Bennion referred to, wherein they held that the amounts expended——

The Court: It is not necessary to discuss the case [6] at this time. Just state the issues.

Mr. Melville: Regarding the personal residence issue, that is the ranch house that depreciation has been claimed on and disallowed. The Government's position simply is that while he did have a personal residence elsewhere, he had a personal residence on the ranch or had a ranch house which he could go to any time he wanted to, and it was there exclusively for his purposes as a retreat, as it were, and we feel that the depreciation on that is a personal matter and is not allowable.

The Court: I understand you have a stipulation of most of the facts?

Mr. Bennion: Yes. At this time I should like to offer the original and two copies of the stipulation of facts which covers the circumstances that I have related and sets forth the detail of the expenses and fees that are in controversy.

The Court: It will be received.

Mr. Mackay: I call Mr. Howard, please.
Whereupon,

LINDSAY C. HOWARD

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows: [7]

The Clerk: Will you state your name for the record, please?

The Witness: Lindsay C. Howard.

Direct Examination

By Mr. Mackay:

Q. Mr. Howard, what was your business around the beginning of 1942? A. Automobile.

Q. Whereabouts?

A. San Francisco and Los Angeles.

Q. Had you lived in that district quite some time?

A. I had.

Q. I call your attention, Mr. Howard, to page four of a stipulation which we have just filed here. I call your attention to an item there about midway down, a \$522.80 check number 7855 dated September 5, 1943, issued to Baker, Selby and Ravenal, attorneys in Washington. I will ask you what those attorneys did for you?

A. That was expense covering the court-martial proceedings.

Q. The next item—I will withdraw that at the moment. Did they work on any other thing other than the court-martial proceedings?

A. That was all. [8]

Q. I call your attention to the next one, which is a payment dated September 14, 1943, a \$5,000 by check 7890 issued to Walter McGovern; and I will ask you if Walter McGovern was your attorney?

(Testimony of Lindsay C. Howard.)

A. He was.

Q. Did he represent you both in the civil suits as well as in the court-martial?

A. That's correct.

Q. Do you have any recollection as to what that was paid for, that \$5,000?

A. The \$5,000 was for expense on the court-martial and the civil case, and also as a retainer in both cases.

Q. Can you make any allocation or any recollection of what portion of that was for court-martial and what portion for the other?

A. Well, my judgment would be that it was about half and half.

Q. I see. He was handling both cases at the same time?

A. That's right.

Q. I call your attention to an item there of \$3,000 for which a check number 8013 dated 12/29/43 and made out to Walter McGovern—I will ask you what that was for?

A. That was the final payment on the court-martial expense.

Q. I shall call your attention to an item under 1944, [9] which is a check number 8074 for \$2,550 and is dated 3/31/44 to Gus Rinco. Will you please tell the Court who he was and what he did?

A. He was an ex-Colonel and that was solely for the court-martial proceedings.

Q. I have asked you about certain items there. Now, what were the other items on this sheet paid for?

(Testimony of Lindsay C. Howard.)

A. They were for attorneys' expenses in connection with the court-martial proceedings.

Q. I have asked you about the court-martial—I mean other than those for the court-martial that you have identified?

A. The others were for the civil proceedings.

Q. Mr. Howard, I will ask you if at the time Mrs. Howard brought that suit against you in the Superior Court, whether or not attachments were made on your business?

A. On my business and my residence.

Q. Where was your residence?

A. In San Mateo, California.

Q. Were you living there in your residence at that time? A. I was not.

Q. How long since had you lived in that place?

A. I hadn't lived in it since—I imagine it had been vacant about a year.

Q. A year? A. Yes. [10]

Q. What had you been holding that for?

A. Trying to rent it or sell it.

Q. Where were you living in the meantime there?

A. I was living in San Francisco.

Q. A home or apartment?

A. Apartment.

Q. During the years involved here, 1943, '44, '45 and '46, did you maintain a residence here in Los Angeles in Beverly Hills? A. I did.

Q. Do you still maintain that? A. I do.

Q. Do you vote in Los Angeles? A. I do.

Q. Los Angeles County, I mean. A. I do.

(Testimony of Lindsay C. Howard.)

Q. Do you have a ranch in Ventura County?

A. I have.

Q. There is a building on that—I beg your pardon. When you purchased that ranch was there a house on it?

A. There was.

Q. What do you use that house for? What did you use that house for?

A. We used it very little, as a matter of fact. I go to the ranch, I imagine, at least twice a week and I probably [11] go in the house maybe once a month, because it is only an hour to the ranch up there and we spend sometimes in the summer time—we might spend two or three weeks there.

Q. Do you regard that as your residence?

A. I do not.

Q. When you go to the ranch where do you get your meals?

A. All at the bunkhouse.

Q. What do you mean, “the bunkhouse”? Is it separate and apart from the house?

A. A separate building.

Q. Give a little description of what the bunkhouse is used for.

A. That is to feed the ranch hands and also to quarter them.

Q. I see. Do you have a foreman there?

A. I have not.

Mr. Mackay: That is all.

Cross-Examination

By Mr. Melville:

Q. When did you enter the Army, Mr. Howard?

A. In 1942, I believe it was—in March, I think.

(Testimony of Lindsay C. Howard.)

Q. At that time what was your rank?

A. Captain.

Q. When did you get out of the Army? [12]

A. It was September of '43.

Q. On what terms or basis were you released from active duty? A. Medical discharge.

Q. Your commission as a Captain was a reserve commission, I take it? A. No.

Q. You mean to testify that you were given a regular commission as a Captain?

A. Well, I imagine it was a reserve commission, then.

Q. You don't know?

A. No. I went in as a Captain.

Q. You came out as a Captain?

A. That's right.

Q. You weren't retired because of your physical condition, were you? A. I was——

Mr. Mackay: Is that material?

Mr. Melville: It might be. I don't know.

Q. (By Mr. Melville): Were you retired as a Captain? Are you drawing retired pay?

A. No, I am not.

Q. Were you given a medical discharge, released from active duty? [13] A. That's correct.

Q. While you were in the Army, Mr. Howard, you knew as an officer, reserve officer, did you not, that when an enlisted man or officer was brought before court-martial that they made counsel available to you? A. That's right.

Q. Without any cost to you?

(Testimony of Lindsay C. Howard.)

A. That's right.

Q. When was the court-martial proceeding first instituted against you?

A. I haven't got those exact dates.

Q. Well, do you have the copy——

Mr. Mackay: We will stipulate to that here. On or about November 20, 1943, general court-martial was appointed. I am on page three.

Q. (By Mr. Melville): Inasmuch as the court-martial was appointed, according to the stipulation, on or about November 20, 1943, why did you testify that prior thereto—namely, on August 5, 1943—you paid \$522.80 to Baker, Selby and Ravenal in Washington in connection with the court-martial?

A. The court-martial proceedings started in Washington and I didn't have anybody appointed as counsel, and this was to try to stop the court-martial proceedings.

Q. Where were you stationed at the time? [14]

A. Washington.

Q. Although the court-martial was not convened in your case or ordered in your case until November, way back in August you were using civil counsel to try to stop it; is that correct?

A. That's correct.

Q. What did they do for you?

A. Well, they were threatening to court-martial me in Washington unless I made the payment.

Q. What did Baker, Shelby and Ravenal do for you?

A. Advised me not to make the payment.

(Testimony of Lindsay C. Howard.)

Q. What else?

A. And they had correspondence with the War Department; and the result was that I was transferred to San Francisco so that I could go on with my civil case.

Q. For that they charged you \$522.80?

A. They did.

Q. Then in September you testified—September 14, 1943—you paid \$5,000 to Walter McGovern. Was your testimony that that was partly for the court-martial and partly for the civil suit?

A. That's correct.

Q. How do you know?

A. Mr. McGovern told me that.

Q. Did he render you any statement for that \$5,000? [15]

A. He did.

Q. Did he segregate it as between the court-martial proceedings and the civil proceedings?

A. No, he didn't.

Q. Do you know if your book of account is in court this morning?

A. I don't know.

Mr. Melville: Mr. Mackay, is it?

Mr. Mackay: I believe it is.

Mr. Melville: Will you produce it, please?

Mr. Mackay: I can find it for you.

Mr. Melville: Mr. Mackay, may it be stipulated that the book you have handed me is the book of account kept for Mr. Howard?

Mr. Mackay: That's right.

Q. (By Mr. Melville): Mr. Howard, I call your attention to this book and to the date on September

(Testimony of Lindsay C. Howard.)

14, 1943, having to do with check number 7890 and ask you to read the——

Mr. Mackay: You may read it in.

Mr. Melville: The entry in the book of Mr. Howard which is before the witness, reads: "Walter McGovern, legal services, Howard versus Howard, \$5,000. Bill dated 9/14/43."

Q. (By Mr. Melville): The court-martial proceedings wasn't entitled Howard versus Howard? [16]

A. They were as far as Mr. McGovern was concerned. All his bills were made out the same way.

Q. What was your testimony with respect to the \$3,000 item in December of '43, an amount which you paid to Walter McGovern?

A. That was solely for court-martial.

Q. Why do you say "solely for court-martial"?

A. Because that bill was presented after the court-martial proceedings were concluded.

Q. It was also presented while your civil proceeding was pending, wasn't it? A. That's correct.

Q. Did he make any segregation in that bill as between court-martial and Howard versus Howard?

A. I don't believe so.

Q. Then you have no way of knowing but this was just an additional fee for legal services rendered?

A. Except at the time he presented the bill that is what he told me.

Q. Altogether, according to your testimony, how much did you spend to defend that court-martial proceeding?

(Testimony of Lindsay C. Howard.)

A. Oh, I wouldn't have any idea what the total amount was.

Q. While you were in the Army how many residences did [17] you maintain?

A. Never over one at a time.

Q. How many do you maintain now?

A. Just one.

Q. That is the one in Beverly Hills?

A. That's correct.

Q. When did you acquire that? A. 1942.

Q. When did you dispose of your San Mateo residence?

A. I don't recall just what year that was.

Q. When were you living in San Francisco in an apartment?

A. I lived in San Francisco for—— it was either two or three years after the divorce proceedings.

Q. Fix that as to years.

Mr. Mackay: We stipulate for your information '38 is when he got his divorce.

Q. (By Mr. Melville): Your testimony on direct was you had a residence in San Mateo but you didn't live there because you had an apartment in San Francisco at which you lived? A. That's correct.

Q. When was that?

A. From 1938 to '40, I think it was.

Q. Is it your testimony that at no time in your life have [18] you maintained more than one residence?

A. That is right.

Q. This ranch that you acquired in Ventura County has bunkhouses on it for the help, has it not?

(Testimony of Lindsay C. Howard.)

A. That is correct.

Q. It has a foreman's house, has it not?

A. That is correct.

Q. And that is where your manager or foreman of the ranch lives?

A. I haven't got a foreman.

Q. Who lives in the foreman's house?

A. The man in charge of the horses.

Q. He is the man that you look to to run the ranch in your absence?

A. No. My citrus man runs the farming part of it.

Q. Where does he live?

A. He lives off the property.

Q. And this ranch house that depreciation was disallowed on is used for what purpose?

A. It is used for two or three weeks in the summer-time. We go up there when the children are out of school, and once in a while on a week-end.

Q. When you say "we," who?

A. Mrs. Howard and the children.

Q. And yourself? [19] A. That's correct.

Q. You spend your vacations there?

A. Part of the time.

Q. And week-ends?

A. No. I usually stay in a bunkhouse if I go up week-ends.

Q. Does anybody live in that house except you and Mrs. Howard or the children? A. No.

Q. In other words, when you are not using it as a retreat, just like one would use a beach house or cabin in the mountains, it is not used at all; isn't that right?

(Testimony of Lindsay C. Howard.)

A. That's correct.

Mr. Melville: No more questions.

Redirect Examination

Q. (By Mr. Mackay): Mr. Howard, you were asked when this court-martial began. I will ask you if it isn't a fact that a long time prior to the institution of court-martial proceedings against you—and I am speaking about formal proceedings—you had been in receipt of a number of directives or endorsements from the Department asking you and demanding that you pay up on this, pay the wife the amount she was claiming? A. That's correct.

Q. Do you recall about how many endorsements you had [20] received prior to the institution of the formal proceedings?

A. Oh, I would say seven or eight.

Q. How long had that been going on prior to the formal instituting of proceedings?

A. I would say for a period of seven or eight months.

Q. During that seven or eight months you had your attorneys working on the preliminary Army court-martial — contemplated Army court-martial proceedings—in an endeavor to have those stopped?

A. That's right.

Q. At that time were they gathering information to support your claim?

A. I didn't get the question.

Q. At that time were they gathering information to support your claim in your defense?

(Testimony of Lindsay C. Howard.)

A. They were.

Mr. Mackay: That is all.

Recross-Examination

Q. (By Mr. Melville): Referring to the court-martial proceedings just once again, Mr. Howard, is it not correct that the only charge against you in that court-martial proceeding was conduct unbecoming an officer and a gentleman in that you didn't make these payments which were to your wife or divorced wife as per the court decree? [21]

Mr. Mackay: If your Honor please, I think that is covered by the stipulation.

Mr. Melville: Your Honor, I don't think it is. The stipulation quotes only a portion of the specification, and in court-martial proceedings—and I can inform you on this, Mr. Mackay——

Mr. Mackay: Thank you, Mr. Melville.

Mr. Melville: Court-martial proceedings have a charge or charges, and under each charge they have one or more specifications. This stipulation purports to quote a portion of the specification. I am interested in establishing, as I understand the fact to be, that there was only one charge and only one specification, and the charge was conduct unbecoming an officer.

Q. (By Mr. Melville): Is that right?

A. 95th Article of War.

Mr. Mackay: I will admit that, if that is what you want to prove.

Mr. Melville: Stipulated?

Mr. Mackay: Yes.

Mr. Melville: And only one specification under

(Testimony of Lindsay C. Howard.)

that charge, and that is the one that is quoted in part?

Mr. Mackay: That's right.

Mr. Melville: So stipulated. No more questions.

Mr. Mackay: Thank you, Mr. Howard.

The Court: You are excused.

(Witness excused.)

The Court: Any other witnesses?

Mr. Mackay: We would like to introduce the income tax returns for the years involved.

Mr. Melville: No objection. Just to keep the record straight, your Honor, inasmuch as the Respondent would expect to get these back afterward, may they go in as Respondent's exhibits?

Mr. Mackay: I don't care whose exhibits they go in for. They may go in in joint. There are four.

Mr. Melville: I didn't know Mr. Mackay was going to put them in. I didn't bother to strip them and I don't have a stapler remover at the moment. If it is agreeable with counsel, I will strip these returns of everything that was added subsequent to the time they were filed, and introduce them in evidence as Respondent's exhibits.

The Court: A, B, C and D.

The Clerk: What years?

The Court: Consecutive.

Mr. Melville: 1943, '44, '45 and '46.

(The documents above-referred to were received in evidence and marked Respondent's Exhibits A, B, C and D.)

Mr. Mackay: I want to express my appreciation to [23] the Court.

The Court: Would you like to file a brief?

Mr. Mackay: Yes.

The Court: The Clerk will fix the time.

(Whereupon, at 10:00 o'clock a.m., Thursday, July 13, 1950, the hearing in the above-entitled matter was closed.) [24]

Filed T.C.U.S. Aug. 10, 1950.

[Title of Tax Court and Causes Nos. 20860 - 23168.]

Promulgated January 24, 1951

FINDINGS OF FACT AND OPINION

1. Expenses for legal fees and costs incurred in a Court Martial proceeding against petitioner were deductible from income of petitioner.

2. Expenses incident to defense of an action brought by his divorced wife to collect payments of money awarded the divorced wife in a divorce action are not deductible from income of petitioner.

3. Depreciation on a ranch house, the sole use of which was the occasional occupancy by petitioner and his family, held not allowable as a business deduction.

A. Calder Mackay, Esq., and Adam Y. Bennion, Esq., for the petitioner.

H. A. Melville, Esq., for the respondent.

The respondent determined deficiencies in petitioner's tax liability as follows:

1943	\$6,204.99	
1944	3,439.12	
1945	2,077.84	
1946	5,185.25	[23]

The issues arose from the disallowance by respondent of certain deductions as business expenses for legal fees and of depreciation on petitioner's ranch house and its furnishings. Other adjustments will be made in the recomputation consequent hereon. Part of the facts were stipulated, the stipulation being incorporated herein by reference.

FINDINGS OF FACT

Petitioner is an individual with a residence in Beverly Hills, California. The returns for the periods involved (excepting 1943) were filed with the collector of internal revenue for the sixth district of California.

Petitioner and Anita Z. Howard were married June 1, 1925. On August 23, 1938, they executed a property settlement agreement providing, in part, that the petitioner would pay to Anita Z. Howard during her natural life, or until she remarried, a monthly sum of \$1,250, commencing August 1, 1938. On November 5, 1938, Anita Z. Howard was granted a final divorce by a decree of the Second Judicial District Court of the State of Nevada in and for the County of Washoe, which decree approved, ratified and adopted in its entirety, the property settlement agreement of the parties and expressly ordered and

adjudged that the covenants therein contained should be performed.

Petitioner made the payments to Anita Z. Howard of \$1,250 per month, as specified in the property settlement agreement, from August 1938 through the calendar year 1941, and then discontinued such payments.

Thereupon, Anita Z. Howard commenced an action against petitioner in the Superior Court of the State of California in and for the City and County of San Francisco, to recover the monthly payments alleged to be due her under the terms of the property settlement agreement, and praying that the Nevada decree be established as a foreign judgment and enforced by order of the California court.

Petitioner filed an "Answer and Cross-Complaint" in the action, denying liability upon two grounds:

(a) That Anita Z. Howard had remarried under common law and hence his obligation to make monthly payments had terminated under the terms of the property settlement agreement; and

(b) That the property settlement agreement was null and void, having been procured by the fraud and deceit of Anita Z. Howard, in that during their married life, and prior to the execution of the agreement, she had represented to petitioner that she had been a faithful wife, whereas in truth and fact for four years prior to the execution of the agreement she had been an unfaithful wife to plaintiff, unbeknownst to him.

The cross-complaint prayed for the cancellation and annulment of the property settlement agreement

and that portion of the decree of the Nevada court which purported to approve and adopt the same.

Anita Z. Howard filed a demurrer to the Answer and Cross-Complaint, which was sustained by the Superior Court. The decision was reversed by the District Court of Appeal, First District, Division 2, California, on April 24, 1945, in *Howard v. Howard*, 157 Pac (2d) 874, but was affirmed by the Supreme Court of California on November 27, 1945, in *Howard v. Howard*, 163 Pac. (2d) 439. The opinions by the District Court of Appeal and the Supreme Court of California, and the facts set forth therein were, by stipulation of the parties, incorporated herein and made a part hereof.

Petitioner was commissioned a Captain in the United States Army Reserve on or about April 27, 1942, and in March 1944, while still a Captain, was released from active duty as a reserve officer for medical reasons. He was not awarded disability retirement benefits. On or about November 20, 1943, a General Court Martial was appointed to try petitioner on the charge of Conduct Unbecoming an Officer and a Gentleman, the specification of the alleged violation being that he—

* * * did, without due cause, from about 1 January 1942, to about 17 November 1943, dishonorably fail, refuse, and neglect to pay to Anita Zabala Howard, divorced wife of said Captain Lindsay C. Howard, the sum of One Thousand Two Hundred Fifty (\$1,250.00) Dollars per month as and for the support of said Anita Zabala Howard, which sum the said Cap-

tain Lindsay C. Howard was ordered to pay by a valid decree, dated 5 November 1938, rendered by a court of competent jurisdiction in the case of Anita Zabala Howard, Plaintiff, versus Lindsay C. Howard, Defendant, same being Cause No. 60623, in the Second Judicial District Court of the state of Nevada, in and for the County of Washoe, Nevada.

As attorneys' fees, expenses and court costs in the Court Martial proceedings and in the litigation in the Superior Court of Appeal, and Supreme Court of California, petitioner paid the following amounts:

1943

Date of Check	To Whom Issued	Check No.	Amount
2-23-43	Hart & Hart.....	7737	\$ 52.00
3-16-43	Walter McGovern	7761	197.00
5- 5-43	Williams & Williams	7790	25.00
5-17-43	Hart & Hart (Shorthand, etc. In re: deposition)	7804	13.09
6-17-43	Walter McGovern	7830	63.75
8- 5-43	Baker, Selby & Ravenel (Attorneys in Washington)	7855	522.80
9-14-43	Walter McGovern	7890	5,000.00
12- 7-43	Walter McGovern (Services of Edward Bergner)	7984	79.50
12-13-43	Walter McGovern (Disbursements— Howard vs. Howard).....	7991	489.34
12-16-43	Walter McGovern (Expense of Howard vs. Howard).....	7995	525.43
12-23-43	Walter McGovern	8004	50.00
12-29-43	Walter McGovern	8013	3,000.00
			<hr/> \$10,017.91

1944

Date of Check	To Whom Issued	Check No.	Amount
1- 4-44	Walter McGovern	8017	\$ 253.73
2- 1-44	Walter McGovern	8036	195.75
3-27-44	Crocker 1st Nat'l Bank (In re: Howard vs. Howard)	8069	150.00
3-31-44	Gus Ringole	8074	2,550.00
4- 3-44	Otton J. Bauer (Howard vs. Howard —Transcript on Appeal)	8078	265.00
4- 3-44	Walter McGovern (Telephone— Howard vs. Howard)	8077	31.26
5- 3-44	Notary Fee	Petty Cash	.50
5- 4-44	Fee to file Revocation of Power of Attorney No. 8092.....	\$10	
	Refund	7	
		—	3.00
6-12-44	Notary fees	8110	2.00
			<hr/>
			\$ 3,451.24

1946

Walter McGovern	\$ 5,000.00
Printing petition for rehearing.....	92.21
Costs in trial court.....	196.80
Costs on appeal.....	100.00
Release of attachment.....	2.00
Recording satisfaction of judgment.....	2.00
<hr/>	
\$ 5,393.01	

Petitioner was engaged in the trade or business of being an officer in the United States Army from the date he was commissioned a Captain on April 27, 1942 through the entire year 1943, and if he had been convicted in the General Court Martial proceedings he would have been discharged from such trade or business in view of the 95th Article of War (10 U.S.C.A. Section 1567), which reads as follows:

Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

All of the above fees paid to lawyers were incurred either in the civil litigation in the California courts respecting non-payment of alimony or in the General Court Martial proceedings, in which Court Martial proceedings petitioner was acquitted of the charges specified.

In addition to his residence in Beverly Hills, the petitioner purchased a ranch in Ventura County, California, on which was located a ranch house. The petitioner, in claiming depreciation in his Federal income tax returns on the ranch house and furnishings, designated it as the "manager's house" or the "owner's house." In addition to the ranch house, there is a foreman's house, as well as bunk houses where the ranch hands sleep and eat their meals. Petitioner had no ranch manager.

The Howard ranch is only an hour's drive from the petitioner's residence in Beverly Hills and he drives up about twice a week. On such trips he goes alone and usually sleeps and eats his meals at the bunk house. The ranch house is used very little. Petitioner and Mrs. Howard usually take their children to the ranch for two or three weeks in the summer when the children are out of school and occasionally on weekends. Part of the time the Howards use the ranch house on their vacations, just as one would use a beach house or a cabin in the mountains. When the ranch house is not so used, it is vacant.

Respondent disallowed depreciation claimed by petitioner in his returns for depreciation on the ranch house and furnishings. The respondent also disallowed, as being personal expenses, all of the fees paid to lawyers enumerated above.

OPINION

Van Fossan, Judge: Respondent admits that the petitioner, while on active duty as a Captain in the Army, was engaged in a trade or business. Albeit the original instigation of the Court Martial proceedings was at the behest of the petitioner's divorced wife, the charges were made and the trial was conducted and prosecuted by petitioner's employer, the United States Army. The 95th Article of War (10 U.S.C.A. Section 1567) states that a conviction of "conduct unbecoming an officer and a gentleman" carries with it the penalty of dismissal from the service. Thus it was that petitioner was defending himself against possible loss of his commission as an officer in the Army, which was a source of part of his income. The fact that he had other income is immaterial. In *Commissioner v. Heininger*, 320 U. S. 467, the Supreme Court said:

* * * Upon being served with notice of the proposed fraud order respondent was confronted with a new business problem which involved far more than the right to continue using his old advertisements. He was placed in a position in which not only his selling methods but also the continued existence of his lawful business were threatened with complete destruction. So far as appears from the record respondent did not believe, nor under our system of jurisprudence was he bound to believe, that a fraud order destroying his business was justified by the facts or the law. Therefore he did not volun-

tarily abandon the business but defended it by all available legal means. To say that this course of conduct and the expenses which it involved were extraordinary or unnecessary would be to ignore the ways of conduct and the forms of speech prevailing in the business world. * * *

The fact that petitioner was successful in defending himself against the charge and was acquitted demonstrates that petitioner was justified in his position that the charge was baseless. We are of the opinion that under the facts here present legal expenses and costs incurred by petitioner in contesting the Court Martial proceeding constituted legitimate business expenses and were deductible as such. We see no merit in respondent's argument that the item of \$522.80, *supra*, for services in attempting to prevent the institution of the trial by Court Martial was against public policy. Petitioner knew of the threatened action and believed that he was not guilty of the impending charge of misconduct. There was nothing improper in making such representations to the proper authority.

From a careful study of the evidence, which lacks much of being precise and complete, we find that petitioner incurred and paid legal expenses in the amount of \$3,522.80 in 1943 and \$2,550 in 1944 in connection with the Court Martial proceedings, which amounts are deductible as business expenses.

The legal expenses incident to the case of Howard vs. Howard are different. The litigation had its genesis in the personal relationship of the petitioner

and his former wife and stems from the property settlement agreement of 1938. That contract was followed by a divorce and final decree which incorporated the contract provision for payment of the sums fixed therein. The litigation known as *Howard vs. Howard* was predicated on this decree and was instituted by the former wife to compel compliance therewith. It was in no wise related to petitioner's business activity. The whole situation involved personal (as distinguished from business) relationships and personal considerations. It never lost its basic character or personal nature. Throughout the entire history and development of income tax law there has existed a sharply defined distinction between business expenses allowable as deductions and nonallowable personal expenses. If the bars were let down so as to accommodate petitioner's position and approval were given to his argument, this historic distinction would practically cease to exist. The contention that such expenditures are allowable as expenses of retaining income previously earned leaves us unmoved.

It may seem strange that we find no decided case squarely in point. Perhaps this is because the answer seems so obvious that no one has heretofore raised the issue. Be that as it may, we find no basis for petitioner's contention and accordingly affirm respondent's disallowance of the legal expenses incident to the case of *Howard vs. Howard*. The *Kornhauser* case (*Kornhauser vs. United States*, 276 U.S. 145) is not in point since the expenses there under

study grew directly out of and were proximately related to the business activity of the taxpayer. Similar observations might be made as to *Commissioner vs. Heininger*, *supra*.

Petitioner claimed, and respondent disallowed, depreciation on a ranch house and its furnishings. Petitioner contends that the ranch house was not his residence but was used for business purposes. We disagree with the petitioner. Petitioner went to the ranch on the average of twice a week and usually slept in the bunk house where the ranch hands lived. The only use made of the ranch house was perhaps once a month by petitioner, or by petitioner and his family for two or three weeks in the summertime when the children were out of school, and occasionally on a weekend. Petitioner and his family used the ranch house much as one "would use a beach house or a cabin in the mountains." It was apparently never used for business purposes. There was another house which was occupied by the man in charge of petitioner's horses. He had no ranch manager.

A man may have more than one residence. The amount of its use is not controlling. Here there is no evidence of any business use of the property nor does the evidence show affirmatively the size, the purpose or the use of the ranch. Except by indulging in unwarranted inference from the record, we do not know whether it was a business activity or a hobby. Under the facts of record, we have no alternative to holding that petitioner has failed to show that his use of the ranch house was a business use.

His bald statement that it was not his residence does not prove his contention. We affirm the Commissioner on this point.

Reviewed by the Court.

Decisions will be entered under Rule 50.

Raum, J., concurs in the result.

[Seal]

[Title of Tax Court and Causes Nos. 20860 - 23168.]

MOTION TO CORRECT FINDINGS OF FACT

Whereas, on page 8 of its mimeographed report in the above cause The Tax Court found, among other things, "that petitioner incurred and paid legal expenses in the amount of \$3,522.80 in 1943 and \$2,550.00 in 1944 in connection with the Court Martial proceedings, which amounts are deductible as business expenses"; and

Whereas, said sum of \$3,522.80 consists of a payment of \$522.80 on August 5, 1943 to Baker, Selby & Ravenel, attorneys in Washington, and a payment of \$3,000.00 on December 29, 1943 to Walter McGovern; and

Whereas, the uncontradicted evidence in the proceeding establishes that in addition to said amounts the petitioner paid the sum of \$5,000.00 to Walter McGovern on September 14, 1943, one-half of which was for services in connection with the Court Martial proceedings;

Now, Therefore, petitioner respectfully moves that the sum of \$6,022.80 be inserted in the foregoing

finding of fact in lieu of the figure \$3,522.80, as representing payments in 1943 in connection with the Court Martial proceedings. [24]

In support of this motion, the Court's attention is respectfully directed to the following testimony of the petitioner on direct and cross examination:

“Q. I call your attention to the next one, which is a payment dated September 14, 1943, a \$5,000 by check 7890 issued to Walter McGovern; and I will ask you if Walter McGovern was your attorney?

A. He was.

Q. Did he represent you both in the civil suits as well as in the court-martial?

A. That's correct.

Q. Do you have any recollection as to what that was paid for, that \$5,000?

A. The \$5,000 was for expense on the court-martial and the civil case, and also as a retainer in both cases.

Q. Can you make any allocation or any recollection of what portion of that was for court-martial and what portion for the other?

A. Well, my judgment would be that it was about half and half.

Q. I see. He was handling both cases at the same time?

A. That's right. [T. 9]

* * * * *

Q. Then in September you testified—September 14, 1943—you paid \$5,000 to Walter McGovern. Was your testimony that that was partly for the court-martial and partly for the civil suit?

A. That's correct.

Q. How do you know?

A. Mr. McGovern told me that.

Q. Did he render you any statement for that \$5,000?

A. He did.

Q. Did he segregate it as between the court-martial proceedings and the civil proceedings?

A. No, he didn't.

* * * * *

Q. The court-martial proceeding wasn't entitled Howard versus Howard?

A. They were as far as Mr. McGovern was concerned. All his bills were made out the same way." [T. 15, 16, 17.]

Thus, we have uncontradicted testimony that of the \$5,000.00 paid to Walter McGovern on September 14, 1943, one-half (or \$2,500.00) was charged by the attorney and paid by petitioner for services in connection with the Court Martial proceedings—a fact that is not contradicted at all by the circumstances that on the attorney's books the Court Martial proceedings were instigated at the behest of the divorced wife and hence in a broad sense grew out of and were part of "Howard versus Howard." We respectfully submit that the Court is bound by the uncontradicted testimony thus submitted on both direct and cross examination.

Wherefore, it is respectfully prayed that this motion be granted.

Dated January 30, 1951.

Respectfully submitted,

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
/s/ RICHARD N. MACKAY,
Counsel for Petitioner.

Received and Filed T.C.S.U. Feb. 5, 1951.

Denied T.C.U.S. Feb. 12, 1951.

[Title of Tax Court and Causes Nos. 20860 - 23168.]

**MOTION TO RECONSIDER THE COURT'S
OPINION ON THE SECOND ISSUE**

Whereas, the Court's opinion on the second issue in the above-entitled proceeding (page 8 of the mimeographed report) in effect overrules its recent decisions in *Elsie B. Gale*, 13 T.C. 661, and *Barbara B. LeMond*, 13 T.C. 670, which are not cited in the opinion,

Now, Therefore, petitioner respectfully moves that the opinion on the second issue be reconsidered in the light of the memorandum attached hereto, and that the expenses involved in said issue be held to be deductible by the petitioner.

Wherefore, it is respectfully prayed that this motion be granted.

Dated January 30, 1951.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
/s/ RICHARD N. MACKAY,

Counsel for Petitioner. [25]

Memorandum in Support of Motion to Reconsider
The Tax Court's Opinion on the Second Issue

The Court's opinion on the second issue in effect overrules its recent decisions in *Elsie B. Gale*, 13 T.C. 661, and *Barbara B. McMon*, 13 T.C. 670, without citing them.

In those cases divorced wives sought to deduct legal fees incurred to obtain or to increase alimony. As here, the Commissioner sought to disallow the deductions on the ground that they were personal in nature. The Court, in reviewed opinions unanimous on this point, held that the expenses were not personal in nature, declaring in the *Gale* case—

“* * * Moreover, the evidence shows that the legal expense incurred by the petitioner herein was solely for the purpose of producing or collecting increased alimony for past and future years and was in no respect paid in connection with the personal marital difficulties of petitioner and her husband, which had been settled

by separation and divorce over three years before the suit in question was commenced by the petitioner. * * *” (Emphasis added.)

And declaring in the LeMond case—

“* * * the attorneys to whom the fees in question were paid were solely concerned with the financial aspects of the separation, rather than with the settlement of the personal or marital difficulties of the petitioner and her husband. Therefore, it is our opinion that no part of the legal expenses herein constituted personal family expenses and that no allocation of the legal fees in that respect is necessary.”

Yet in the present case, involving legal fees incurred by a husband in defending suit for alimony, the Court declares at page 8—

“* * * The whole situation involved personal (as distinguished from business) relationships and personal considerations. It never lost its basic character or personal nature. Throughout the entire history and development of income tax law there has existed a sharply defined distinction between expenses allowable as deductions and nonallowable personal expenses. If the bars were let down so as to accommodate petitioner’s position and approval were given to his argument, this historic distinction would practically cease to exist.* * *

In identical situations it seems inconceivable that a transaction is “personal” from the standpoint

1943

Schedule 1—NET INCOME

	Income Tax	Victory Tax
Net income per statutory notice dated		
August 6, 1948.....	\$44,655.79	\$48,237.92
As adjusted in accordance with		
Tax Court's opinion	41,132.99	44,715.12
	<hr/>	<hr/>
Difference (decrease)	\$ 3,522.80	\$ 3,522.80
	<hr/> <hr/>	<hr/> <hr/>

Schedule 2—EXPLANATION OF ADJUSTMENTS

The Tax Court holds that petitioner incurred and paid legal expenses in the amount of \$3,522.80 in 1943 and \$2,550.00 in 1944 in connection with Court Martial proceedings which are deductible as business expenses.

Schedule 3—COMPUTATION OF TAX

Net income, Schedule 1.....	\$41,132.99
Less: Personal exemption	\$1,200.00
Credit for dependents.....	1,400.00 2,600.00
	<hr/>
Surtax net income.....	\$38,532.99
Less: Interest on United States obligations....	\$1,704.18
Earned income credit, Schedule 4.....	591.22 2,295.40
	<hr/>
Balance subject to normal tax.....	\$36,237.59
	<hr/> <hr/>
Normal tax at 6%	\$ 2,174.26
Surtax	16,125.12
	<hr/>
Total income tax.....	\$18,299.38
Less: Income tax paid to a foreign country.....	59.94
	<hr/>
Net income tax.....	\$18,239.44
Victory tax net income, Schedule 1.....	\$44,715.12
Less: Specific exemption	624.00
	<hr/>
Income subject to victory tax.....	\$44,091.12
	<hr/> <hr/>

Schedule 3—Computation of Tax—(Continued)

Victory tax at 5%.....	\$ 2,204.56
Less: Credit limited to.....	900.00
Net victory tax.....	1,304.56
Net income and victory tax.....	\$19,544.00
Plus: Unforgiven quarter 1942 tax.....	None
Income and victory tax liability.....	\$19,544.00
Liability per return	15,854.29
Deficiency	\$ 3,689.71

Schedule 4—EARNED INCOME CREDIT

Salaries per statutory notice.....	\$ 9,435.00
Less: Business expense per Schedule 2.....	3,522.80
Earned net income.....	\$ 5,912.20
Entire net income.....	\$41,132.99
Earned income credit (10% of \$5,912.20).....	\$ 591.22

1944

Schedule 5—NET INCOME

Net income per statutory notice dated August 6, 1948.....	\$74,896.32
As adjusted in accordance with Tax Court's opinion.....	72,346.32
Difference (decrease)	\$ 2,550.00

Schedule 6—EXPLANATION OF ADJUSTMENTS

See Schedule 2.

Schedule 7—COMPUTATION OF TAX

Net income, Schedule 5.....	\$72,346.32
Less: Surtax exemptions	1,500.00
Surtax net income.....	\$70,846.32
Surtax	\$42,805.52

Schedule 7—Computation of Tax—(Continued)

Net income	\$72,346.32	
Less: Normal tax exemption.....	\$500.00	
Partially tax-exempt interest 320.77	820.77	
	<u> </u>	<u> </u>
Balance subject to normal tax.....	\$71,525.55	
	<u> </u>	<u> </u>
Normal tax at 3%.....		2,145.77
		<u> </u>
Total normal tax and surtax.....		\$44,951.29
		<u> </u>
Alternative tax, Schedule 8.....		\$38,045.05
		<u> </u>
Smaller tax		\$38,045.05
Less: Income tax paid to a foreign country.....		266.97
		<u> </u>
Income tax liability.....		\$37,778.08
Liability per return.....		36,251.46
		<u> </u>
Statutory deficiency		\$ 1,526.62

	Tax	Interest
Subsequent assessment, Account No. 519014,		
June 10, 1949.....	\$ 509.79	\$129.62
Statutory deficiency	1,526.62	388.17
	<u> </u>	<u> </u>
Balance of deficiency.....	\$1,016.83	\$258.55
	<u> </u>	<u> </u>

Schedule 8—ALTERNATIVE TAX

Net income, Schedule 5.....	\$72,346.32
Less: Excess of net long-term capital gain over net short-term capital loss	23,720.26
	<u> </u>
Ordinary net income.....	\$48,626.06
Less: Surtax exemptions	1,500.00
	<u> </u>
Surtax net income.....	\$47,126.06
	<u> </u>
Surtax	\$24,750.76

Schedule 8—Alternative Tax—(Continued)

Ordinary net income.....	\$48,626.06	
Less: Normal tax exemption.....	\$500.00	
Partially tax-exempt interest	320.77	820.77
	<u> </u>	<u> </u>
Balance subject to normal tax.....	\$47,805.29	
	<u> </u>	
Normal tax at 3%.....		1,434.16
		<u> </u>
Partial tax		\$26,184.92
Plus: 50% of gain.....		11,860.13
		<u> </u>
Alternative tax		\$38,045.05
		<u> </u>

1945

Schedule 9—NET INCOME

Net income per statutory notice dated August 6, 1948.....	\$35,369.54
	<u> </u>
As adjusted in accordance with Tax Court's opinion (no change)	\$35,369.54
	<u> </u>

Schedule 10—COMPUTATION OF TAX

Income tax liability per statutory notice (no change).....	\$16,422.33	
Liability per return.....	14,344.49	
	<u> </u>	
Statutory deficiency	\$ 2,077.84	
	Tax	Interest
Subsequent assessment, Account No. 519015, June 10, 1949	\$1,073.49	\$208.55
Statutory deficiency	2,077.84	403.66
	<u> </u>	<u> </u>
Balance of deficiency.....	\$1,004.35	\$195.11
	<u> </u>	<u> </u>

Received and Filed T.C.U.S. April 10, 1951.

[Title of Tax Court and Cause No. 23168.]

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION

The attached proposed computation is submitted, on behalf of the respondent, to The Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court, pursuant to the statutes in such cases made and provided.

/s/ CHARLES OLIPHANT, ECC,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel,
E. C. CROUTER,
H. A. MELVILLE,
Special Attorneys,
Bureau of Internal Revenue. [27]

C-TS:PD LA:DRR

March 21, 1951

RECOMPUTATION STATEMENT

In re: Lindsay C. Howard, 1230 Benedict Canyon Drive,
Beverly Hills, California.

Docket No. 23168

INCOME TAX LIABILITY

Year	Deficiency
1946	\$5,185.25

The following schedules of recomputation have been made under Rule 50, pursuant to the findings of The Tax Court of the United States, promulgated January 24, 1951.

1946

Schedule 1—NET INCOME

Net income per statutory notice dated Jan. 31, 1949.....	\$84,471.79
As adjusted in accordance with Tax Court opinion (no change)	\$84,471.79

Schedule 2—COMPUTATION OF TAX

Income tax liability per statutory notice (no change).....	\$47,134.73
Liability per return.....	41,949.48
Deficiency	\$ 5,185.25

Received and Filed T.C.U.S. April 10, 1951.

[Title of Tax Court and Causes Nos. 20860 - 23168.]

NOTICE UNDER RULE 50

Take Notice that the Respondent in the above-entitled proceeding filed with the Court on April 10, 1951, a computation and notice, a copy of which is inclosed. This proceeding will be called for hearing upon such computation at 10 a.m. on May 23, 1951, before a Division of the Court at its Washington Office, Constitution Avenue at 12th Street, Northwest, unless, prior to that date, your written acquies-

cence to the entry of a decision based on such computation shall have been filed with the Court.

No further notice of said hearing will be sent.

Dated: April 12, 1951.

/s/ VICTOR J. MERSCH,
Clerk.

To: A. Calder Mackay, Esq.

[28]

[Title of Tax Court and Causes Nos. 20860 - 23168.]

The computation of the respondent filed with the Court on April 10, 1951, has been examined and found to be in accordance with the determination of the Court as set forth in its report. Petitioner therefore joins with the respondent in praying that the Court enter its decision based upon such computation, reserving however the right to contest the correctness of such decision in the appellate courts as provided by statute.

/s/ A. CALDER MACKAY,
/s/ ADAM Y. BENNION,
Attorneys for Petitioner.

Received and Filed April 24, 1951.

[29]

The Tax Court of the United States
Washington

Docket No. 20860

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court promulgated January 24, 1951, the respondent filed a recomputation of tax on April 10, 1951, and petitioner filed an acquiescence in said computation on April 24, 1951; Now, therefore, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years 1943, 1944 and 1945 in the respective amounts of \$3,689.71, \$1,016.83 and \$1,004.35.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Entered April 26, 1951.

[30]

The Tax Court of the United States
Washington

Docket No. 23168

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court promulgated January 24, 1951, the respondent filed a recomputation of tax on April 10, 1951, and petitioner filed an acquiescence in said computation on April 24, 1951; Now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year ended December 31, 1946 in the amount of \$5,185.25.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Entered April 26, 1951.

[31]

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket Nos. 20860 - 23168

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISIONS
OF THE TAX COURT OF THE
UNITED STATES

To the Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:

Lindsay C. Howard, by and through his attorneys, hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decisions entered by The Tax Court of the United States on April 26, 1951, “* * * that there are deficiencies in income tax for the calendar years 1943, 1944 and 1945 in the respective amounts of \$3,689.71, \$1,016.83 and \$1,004.35” and “* * * deficiency in income tax for the taxable year ended December 31, 1946 in the amount of \$5,185.25”, in respect of the Federal tax liability of the Petitioner, Lindsay C. Howard. This Petition for Review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

I.

Nature of the Controversy

The issue is whether the Commissioner of Internal Revenue and the Court below erred in determining that expenses for legal fees and costs incurred in defense of an action brought [32] by Petitioner's divorced wife to collect alimony are not deductible from Petitioner's gross income as a nonbusiness expense.

Petitioner and Anita Z. Howard were married on June 1, 1925. On August 23, 1938, they executed a property settlement agreement providing, in part, that the Petitioner would pay to Anita Z. Howard during her natural life, or until she remarried, a monthly sum of \$1,250.00 commencing August 1, 1938. On November 5, 1938, Anita Z. Howard was granted a final divorce by a decree of the Second Judicial District Court of the State of Nevada in and for the County of Washoe, which decree approved, ratified and adopted, in its entirety, the property settlement agreement of the parties and expressly ordered and adjudged that the covenants therein contained should be performed.

Petitioner made the payments to Anita Z. Howard of \$1,250.00 per month, as specified in the property settlement agreement, from August 1, 1938, through the calendar year 1941, and then discontinued such payments.

Thereupon, Anita Z. Howard commenced an action against Petitioner in the Superior Court of the State of California, in and for the City and County

of San Francisco, to recover the monthly payments alleged to be due her under the terms of the property settlement agreement, and praying that the Nevada decree be established as a foreign judgment and enforced by order of the California Court.

Petitioner filed an answer and cross-complaint in the action, denying liability upon two grounds:

(a) That Anita Z. Howard had remarried under common law, and hence, his obligation to make monthly payments had terminated under the terms of the property settlement agreement;

(b) That the property settlement agreement was null and void having been procured by fraud and deceit of Anita Z. Howard in that during their married life and prior to the execution of the agreement she had represented to Petitioner that she had been a faithful wife, whereas in truth and fact for four years prior to the execution of the agreement she had been an unfaithful wife to Petitioner, unbeknownst to him. The cross-complaint prayed for the cancellation and annulment of the property settlement agreement and that portion of the decree which purported to approve and adopt the same.

Anita Z. Howard filed a demurrer to the answer and cross-complaint, which was sustained by the Superior Court. The decision was reversed by the District Court of Appeals, First District, Division Two, California, on April 24, 1945, in *Howard vs. Howard*, 157 Pac. (2d) 874, but was affirmed by the Supreme Court of California on November 27, 1945, in *Howard vs. Howard*, 163 Pac. (2d) 439.

The Tax Court held that the legal fees and costs

incurred by the Petitioner in defense of said litigation are not deductible from the gross income of Petitioner on the ground that they are personal in nature.

The Petitioner is aggrieved by The Tax Court's opinion and by its decision, in that in two recent decisions, *Elsie B. Gale*, 13 T.C. 661, and *Barbara B. LeMond*, 13 T.C. 670, The Tax Court denied the Commissioner's contention that legal fees and costs incurred by the divorced wife to obtain or increase alimony were personal in nature, and held that said expenses were properly deductible by the divorced wives. In identical situations it seems inconceivable that a transaction is "personal" from the standpoint of an ex-husband and not "personal" from the ex-wife's standpoint. Legal fees paid to resist alimony are no more personal to an ex-husband than are legal fees paid by an ex-wife to obtain alimony. The legal fees and costs incurred by Petitioner in said litigation should therefore be allowed Petitioner as a deductible nonbusiness expense. The Tax Court erred in failing to so hold.

In addition The Tax Court erred in its Findings of Fact in respect to the amounts incurred and paid as legal expenses in connection with court-martial proceedings, which amounts the lower Court held were deductible as business expenses. The uncontradicted evidence in the proceeding establishes that in 1943 in addition to the sum of \$3,522.80 as found by The Tax Court, the Petitioner paid the sum of \$5,000.00 to Walter McGovern on September 14, 1943, one-half of which was for services in connection with

the court-martial proceedings. Petitioner incurred and paid legal expenses in the sum of \$6,022.80 in connection with said proceedings. The Tax Court erred in failing to so find and in failing to grant Petitioner's Motion to Correct Findings of Fact in respect to said item.

II.

Court In Which Review Is Sought

The United States Court of Appeals for the Ninth Circuit is the Court in which review of said decisions of The Tax Court of the United States is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code.

III.

Venue

The Findings of Fact and Opinion of The Tax Court were entered on January 24, 1951. Petitioner filed his income tax return for the calendar year 1943 with the Collector of Internal Revenue for the First District of California, and for the calendar years 1944, 1945 and 1946 with the Collector of Internal revenue for the Sixth District of California, all within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. The Petitioner is an individual, who is residing at 1230 Benedict Canyon Drive, Beverly Hills, California.

The parties hereto have not stipulated that said decisions may be reviewed by any Court of Appeals other than the one herein designated.

Wherefore, Petitioner prays that the Findings of Fact and Opinion and the Decisions of The Tax

Court be reviewed by the United States Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated July 20, 1951.

/s/ A. CALDER MACKAY,
/s/ ARTHUR MCGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
/s/ RICHARD N. MACKAY,
Attorneys for Petitioner.

Filed T.C.U.S. July 23, 1951.

[Title of U. S. Court of Appeals and Causes.]

NOTICE OF FILING PETITION FOR REVIEW

To Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that the Petitioner on the day of July, 1951, filed with the Clerk of The Tax Court of the United States at Washington, D. C., a Petition for Review by the United States Court of Appeals for the Ninth Circuit of the Findings of Fact and Opinion and Decisions of The Tax Court of the United States heretofore rendered in the above-entitled causes. A copy of the Petition for

Review, as filed, is hereto attached and served upon you.

Dated July 20, 1951.

/s/ A. CALDER MACKAY,
/s/ ARTHUR MCGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
/s/ RICHARD N. MACKAY,
Attorneys for Petitioner.

Acknowledgment of Service attached. [33]
Filed T.C.U.S. July 23, 1951.

[Title of U. S. Court of Appeals and Causes.]

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

Comes Now the Petitioner on review herein, by his attorneys, A. Calder Mackay, Arthur McGregor, Howard W. Reynolds, Adam Y. Bennion and Richard N. Mackay, and hereby designates for inclusion in the record on review in the above-entitled proceedings the complete record of all of the proceedings and evidence taken before The Tax Court of the United States and all matters required by Rule 75(g) of the Federal Rules of Civil Procedure, including the following:

1. Docket entries of the proceedings before The Tax Court.

2. Pleadings:

(a) Petitions including attached copies of deficiency notices.

(b) Answers.

3. Stipulation of Facts with exhibits attached.

4. Findings of Fact and Opinion promulgated January 24, 1951. [34]

5. Petitioner's Motions to Correct Findings of Fact and to Reconsider the Court's Opinion on the Second Issue.

6. Decisions entered April 26, 1951.

7. Official report of hearing before The Tax Court on July 13, 1950.

8. All exhibits.

9. Petition for Review and Notice of Filing Petition for Review.

10. This Designation of Contents of Record on Review.

Wherefore, it is requested that copies of the record, as above designated, be prepared and transmitted to the United States Court of Appeals for the Ninth Circuit in accordance with the rules of said Court.

Dated July 20, 1951.

/s/ A. CALDER MACKAY,

/s/ ARTHUR McGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ ADAM Y. BENNION,

/s/ RICHARD N. MACKAY,

Attorneys for Petitioner.

Acknowledgment of Service attached.

[34]

Filed T.C.U.S. July 23, 1951.

The Tax Court of the United States
Washington

Docket Nos. 20860 and 23168

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 34, inclusive, constitute and are all of the original papers and proceedings, including Exhibits 1-A and 2-B attached to the Stipulation of Facts, and Respondent's Exhibits A, B, C and D admitted in evidence, on file in my office as the original and complete record in the proceedings before The Tax Court of the United States in the above entitled proceedings and in which the petitioner in the Tax Court proceedings has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 1st day of August, 1951.

[Seal] /s/ RALPH A. STARNES,
Chief Deputy Clerk.

[Endorsed]: No. 13045. United States Court of Appeals for the Ninth Circuit. Lindsay C. Howard, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: August 6, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13045

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS AND
DESIGNATION

Comes Now Lindsay C. Howard, Petitioner on Review herein, by his attorneys, A. Calder Mackay, Arthur McGregor, Howard W. Reynolds, Adam Y. Bennion and Richard N. Mackay, and states that the points on which he intends to rely in this case are as follows:

1. The Tax Court erred in holding and deciding

that expenses for legal fees and costs incurred in defense of an action brought by Petitioner's divorced wife to collect alimony were personal in nature and therefore not deductible from gross income.

2. The Tax Court erred in failing and refusing to hold and decide that all of said expenses for legal fees and costs are deductible as an ordinary and necessary nonbusiness expense under Section 23(a) (2) of the Internal Revenue Code.

3. The Tax Court erred in that its Findings of Fact and Opinion are not supported by, but are contrary to, the evidence, to wit, The Tax Court found and held that Petitioner incurred and paid legal expenses in the amounts of \$3,522.80 in 1943 and \$2,550.00 in 1944 in connection with Court-Martial proceedings; whereas the uncontradicted evidence establishes that in addition to said amounts the Petitioner paid the sum of \$5,000.00 to Walter McGovern on September 14, 1943, one-half of which was for services in connection with the Court-Martial proceedings. The Tax Court erred further in failing to grant Petitioner's Motion to Correct Findings of Fact in respect of said item.

4. The Tax Court erred in failing and refusing to find as fact that Petitioner incurred and paid legal expenses in the sum of \$6,022.80 in 1943 in connection with the Court-Martial proceedings.

Petitioner hereby designates the entire record as certified to the Clerk of the above-entitled Court, with the exclusion of the original exhibits pursuant to the "Stipulation and Order Re Exhibits" to be

submitted forthwith, as necessary to be printed for the consideration of the points set forth above, including this Statement of Points and Designation and said "Stipulation and Order Re Exhibits" to be submitted.

Dated August 9, 1951.

/s/ A. CALDER MACKAY,
/s/ ARTHUR MCGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
/s/ RICHARD N. MACKEY,
Attorneys for Petitioner.

[Endorsed]: Filed Aug. 11, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION AND ORDER RE
EXHIBITS

It is hereby agreed and stipulated by counsel in the above-entitled cause that Respondent's original Exhibits A, B, C and D may be excluded from the printed record but may be referred to by the parties in brief and argument as if part of that record.

/s/ THERON L. CAUDLE,
Assistant Attorney General,
Counsel for Commissioner of
Internal Revenue.

/s/ ADAM Y. BENNION,
Counsel for Lindsay C. Howard.

So ordered:

/s/ WILLIAM DENMAN,
/s/ CLIFTON MATHEWS,
/s/ HOMER T. BONE,
Judges U. S. Court of Appeals
for the Ninth Circuit.

Dated August 20, 1951.

[Endorsed]: Filed Aug. 21, 1951. Paul P. O'Brien,
Clerk.

No. 13045.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING BRIEF FOR PETITIONER.

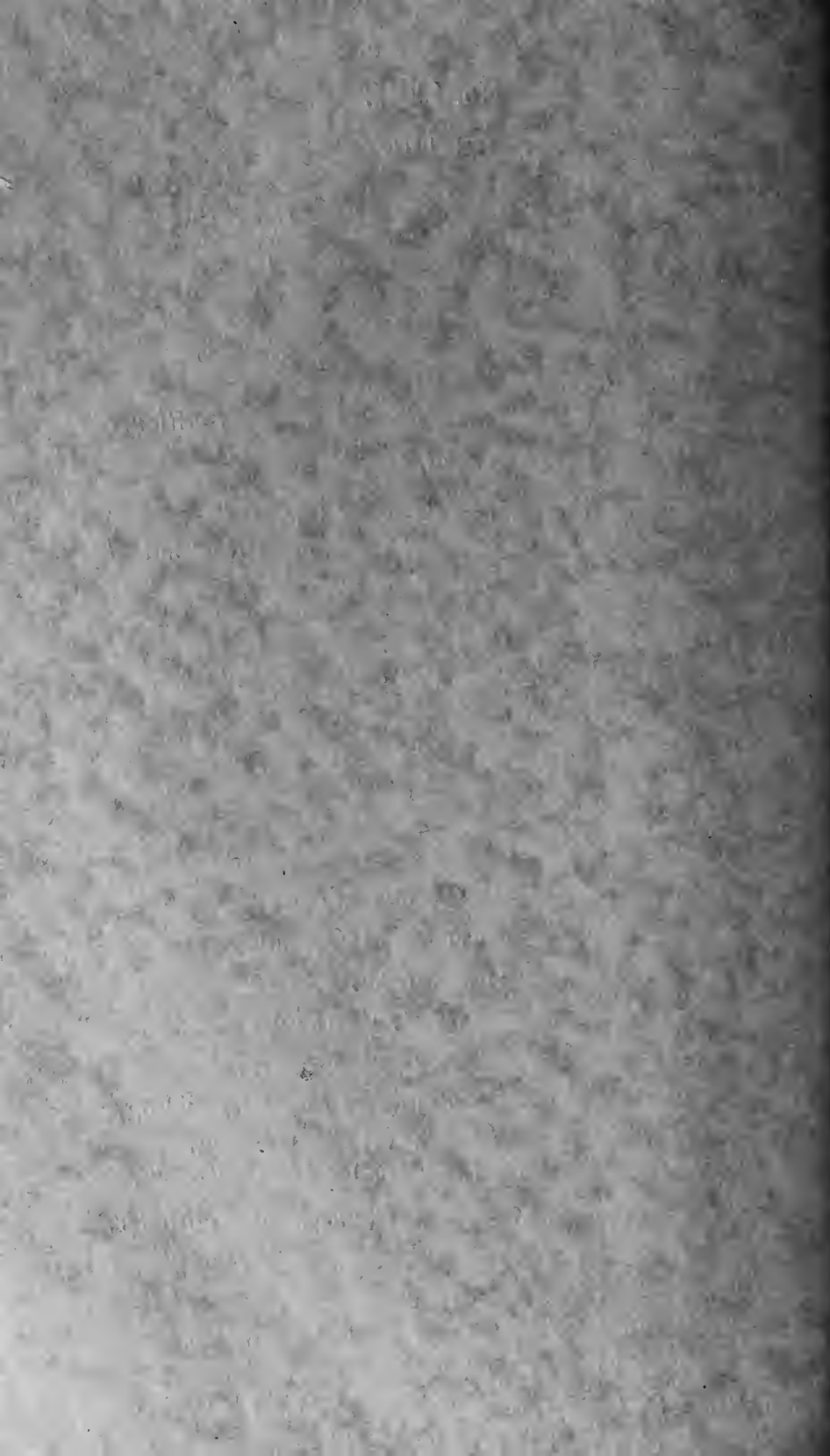
A. CALDER MACKAY,
ARTHUR MCGREGOR,
HOWARD W. REYNOLDS,
ADAM Y. BENNION,
RICHARD N. MACKAY,

728 Pacific Mutual Building,
523 West Sixth Street,
Los Angeles 14, California,

Counsel for Petitioner.

FILED

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III.

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No. 13045.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LINDSAY C. HOWARD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING BRIEF FOR PETITIONER.

Opinion Below.

The Findings of Fact and Opinion of the Tax Court [R. 71-82] are reported at 16 T. C. 157.

Jurisdiction.

Notices of deficiencies were mailed by the Commissioner of Internal Revenue to Petitioner on August 6, 1948, and March 31, 1949, proposing deficiencies in income and victory tax for the calendar year 1943 in the sum of \$6,-204.99 and in income tax for the calendar years 1944, 1945 and 1946 in the sums of \$3,439.12, \$2,077.84 and \$5,185.25, respectively [R. 11-20, 28-29]. Petitions to the Tax Court of the United States were filed by Petitioner on November 1, 1948, and May 18, 1949, pursuant to and within the 90-day period prescribed by Section 272(a) of the Internal Revenue Code [R. 3, 5, 7-20, 24-32]. Issue was joined by the filing of the Commis-

sioner's answers on December 8, 1948, and July 5, 1949 [R. 3, 5, 20-21, 31-32].

The Tax Court's opinion (16 T. C. 157) was promulgated January 24, 1951 [R. 71-82]. On February 5, 1951, Petitioner filed a motion to correct findings of fact [R. 82-85] and a motion to reconsider the Court's opinion on the second issue [R. 85-88]; both of said motions were denied on February 12, 1951 [R. 4]. And on April 26, 1951, a decision was entered in both proceedings [R. 97-98]. Petition for Review of said decisions was filed by the Petitioner on July 23, 1951 [R. 99-104], pursuant to Section 1141 of the Internal Revenue Code and within the three months' period specified in Section 1142 of the Internal Revenue Code. Petitioner filed his income tax return for the calendar year 1943 with the Collector of Internal Revenue for the First District of California and for the calendar years 1944, 1945 and 1946 with the Collector of Internal Revenue for the Sixth District of California, all within the jurisdiction of this Honorable Court [R. 7, 20, 24, 31, 72, 103].

Questions Presented and Statutes Involved.

1. The principal issue is whether the Tax Court erred in determining that expenses for legal fees and costs incurred in defense of an action brought by Petitioner's divorced wife to collect alimony are not deductible from Petitioner's gross income. The Tax Court held the expenses to be personal in nature and hence nondeductible under Section 24(a)(1) of the Internal Revenue Code, which reads as follows:

“SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) General Rule.—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x);”

The Petitioner maintains, however, that said expenses were not personal in nature (as indeed the Tax Court itself has held in identical cases where divorced wives were the taxpayers seeking similar deductions); and that the expenses were allowable deductions under Section 23(a)(2) of the Internal Revenue Code, which reads as follows:

“SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses—

* * * * *

(2) Non-trade or non-business expenses.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.”

2. The second issue, which becomes academic if Petitioner prevails on the principal issue, is whether the Tax Court erred in failing to find, upon the basis of uncontradicted testimony, that of a legal fee paid by Petitioner to Walter McGovern on September 14, 1943, in the sum of \$5,000.00, one-half was paid for legal services in successfully defending Petitioner in a Court-Martial proceeding (the Tax Court having held that fees paid in defense of such proceedings were deductible from gross income). Disregarding such uncontradicted evidence, the Tax Court erroneously held that the full \$5,000.00 was paid for services rendered in the alimony litigation.

Statement of the Case.

On August 23, 1938, Petitioner and his wife, Anita Z. Howard, executed a property settlement agreement providing, in part, that the Petitioner would pay to Anita Z. Howard during her nature life, or until she remarried, a monthly sum of \$1,250.00, commencing August 1, 1938 [R. 36, 72]. On November 5, 1938, Anita Z. Howard was granted a final divorce by a decree of the Second Judicial District Court of the State of Nevada in and for the County of Washoe, which decree approved, ratified and adopted in its entirety the property settlement agreement of the parties and expressly ordered and adjudged that the covenants therein contained should be performed [R. 36, 72].

Petitioner made the payments to Anita Z. Howard of \$1,250.00 per month, as specified in the property settlement agreement, from August, 1938, through the calendar year 1941, and then discontinued such payments [R. 36, 73].

Thereupon, Anita Z. Howard commenced an action against Petitioner in the Superior Court of the State of California in and for the City and County of San Francisco, to recover the monthly payments alleged to be due her under the property settlement agreement, and praying that the Nevada decree be established as a foreign judgment and enforced by order of the California Court [R. 36, 73].

Petitioner filed an "Answer and Cross-Complaint" in the action, denying liability upon two grounds:

(a) That Anita Z. Howard had remarried under common law and hence his obligation to make monthly payments had terminated under the terms of the property settlement agreement; and

(b) That the property settlement agreement was null and void, having been procured by the fraud and deceit of Anita Z. Howard, in that during their married life, and prior to the execution of the agreement, she had represented to Petitioner that she had been a faithful wife, whereas in truth and fact for four years prior to the execution of the agreement she had been an unfaithful wife to Petitioner, unbeknownst to him [R. 36, 73].

The cross-complaint prayed for the cancellation and annulment of the property settlement agreement and that portion of the decree of the Nevada Court which purported to approve and adopt the same [R. 37, 74].

Anita Z. Howard filed a demurrer to the Answer and Cross-Complaint, which was sustained by the Superior Court. The decision was reversed by the District Court of Appeal, First District, Division 2, California, on April 24, 1945, in *Howard v. Howard*, 157 P. 2d 874, but was affirmed by the Supreme Court of California on November 27, 1945, in *Howard v. Howard*, 163 P. 2d 439 [R. 36, 74].

Petitioner was commissioned a Captain in the United States Army Reserve on or about April 27, 1942. On or

about November 20, 1943, a General Court-Martial was appointed to try Petitioner on the charge of Conduct Unbecoming an Officer and a Gentleman. Said General Court-Martial tried the case and on December 14, 1943, Petitioner was found not guilty and was acquitted of the charge [R. 38, 74].

As attorneys' fees, expenses and court costs in said Court-Martial proceedings and in said litigation in the Superior Court, District Court of Appeal and Supreme Court of California, Petitioner paid the following amounts [R. 39, 75-76]:

<u>1943</u>			
<u>Date of</u> <u>Check</u>	<u>To Whom Issued</u>	<u>Check</u> <u>No.</u>	<u>Amount</u>
2-23-43	Hart & Hart	7737	\$ 52.00
3-16-43	Walter McGovern	7761	197.00
5-5-43	Williams & Williams	7790	25.00
5-17-43	Hart & Hart (Shorthand, etc., in re deposition)	7804	13.09
6-17-43	Walter McGovern	7830	63.75
8-5-43	Baker, Selby & Ravenel (Attorneys in Washington)	7855	522.80*
9-14-43	Walter McGovern	7890	5,000.00
12-7-43	Walter McGovern (Services of Edward Bergner)	7984	79.50
12-13-43	Walter McGovern (Disbursements— Howard v. Howard)	7991	489.34
12-16-43	Walter McGovern (Expense of Howard v. Howard)	7995	525.43
12-23-43	Walter McGovern	8004	50.00
12-29-43	Walter McGovern	8013	3,000.00*
			<hr/>
			<u>\$10,017.91</u>

1944

<u>Date of Check</u>	<u>To Whom Issued</u>	<u>Check No.</u>	<u>Amount</u>
1-4-44	Walter McGovern	8017	\$ 253.73
2-1-44	Walter McGovern	8036	195.75
3-27-44	Crocker 1st National Bank (<i>In re</i> Howard v. Howard)	8069	150.00
3-31-44	Gus Ringole	8074	2,550.00*
4-3-44	Otton J. Bauer [Howard v. How- ard—Transcript on Appeal]	8078	265.00
4-3-44	Walter McGovern (Telephone— Howard v. Howard)	8077	31.26
5-3-44	Notary Fee	Petty Cash	.50
5-4-44	Fee to file revocation of Power of Attorney No. 8092	\$10.00	
	Refund	7.00	3.00
6-12-44	Notary fees	8110	2.00
			<u>\$ 3,451.24</u>

1946

<u>To Whom Issued</u>	<u>Amount</u>
Walter McGovern	\$ 5,000.00
Printing petition for rehearing	92.21
Costs in trial court	196.80
Costs on appeal	100.00
Release of attachment	2.00
Recording satisfaction of judgment	2.00
	<hr/>
	\$ 5,393.01
	<hr/>

The Tax Court held that the expenses for legal fees and costs incurred in defense of the action brought by Petitioner's divorced wife to collect alimony are not deductible from Petitioner's gross income as a non-business expense on the ground they are personal in nature. In addition the Tax Court held that the expenses for legal fees and costs incurred by the Petitioner in defense of the Court-Martial proceedings are deductible as a business expense and found as fact that such expenses were incurred in the amount of \$3,522.80 in 1943 and \$2,550.00 in 1944, being the three items asterisked above. But, as heretofore stated, the Court refused to allocate one-half of the \$5,000.00 fee paid on September 14, 1943, to the Court-Martial proceedings.

Points Relied On.

1. The Tax Court's conclusion in the instant case that the expenses for legal fees and costs incurred in the defense of an action brought by Petitioner's divorced wife to collect alimony are personal in nature is erroneous in view of its decision in two other cases, wherein the Tax Court denied similar expenses incurred by a divorced wife to obtain an increase in alimony were personal in nature.

2. The evidence is uncontradicted that Petitioner paid the sum of \$5,000.00 to Walter McGovern, his attorney, on September 14, 1943, one-half of which was for services in connection with the Court-Martial proceedings.

3. A finding of fact shall be set aside where, after due regard is given to the opportunity of the Trial Court to judge the credibility of the witness, the finding is clearly erroneous.

ARGUMENT.

I.

Legal Fees and Expenses Incurred by a Divorced Husband in Resisting His ex-Wife's Suit for Alimony Are Deductible as Ordinary and Necessary Expenses Incurred in the Production or Collection of Income or in the Management, Conservation and Maintenance of Property Held for the Production of Income. Said Fees and Expenses Are Not Personal Expenses.

In I. T. 3856, 1947-1 C. B. 23, the Bureau of Internal Revenue considered the question whether counsel fees (1) paid by a wife in attempting to obtain an increase in alimony and (2) paid by a husband in resisting such an increase would be deductible for tax purposes. Without distinguishing between husband and wife, and solely in reliance upon early Board of Tax Appeals' cases, the Bureau ruled that such fees were not deductible by either spouse for the reason that such fees of both parties were personal expenses, since they arose out of the marital relationship.

I. T. 3856, however, has now been reversed by the Tax Court insofar as it had to do with legal fees paid by a wife to secure alimony or obtain an increase in alimony.

In *Elsie B. Gale*, 13 T. C. 661 (aff'd 1951 P-H para. 72,532 (C. C. A. 2, July 24, 1951)), where the divorce had been obtained in 1940, the ex-wife during 1944 paid attorneys' fees of \$4,000.00 for services rendered in 1943 and 1944 in obtaining an increase in alimony. The ex-wife argued that the expense was incurred for the collection of income, but the Commissioner sought to deny the deduction upon the ground that the expense was per-

sonal, as shown by the following statement of the Court on page 667:

“* * * On the other hand, the respondent argues that such expense arose out of the marital relationship existing between the petitioner and her husband and, therefore, constituted purely personal and family expenses, the deduction of which is expressly prohibited by section 24(a)(1) of the code.”

The Court, in a reviewed opinion without dissent on this point, held that the fees were deductible, rejecting the Commissioner's argument that the expenses were personal with the following statements:

“Under the facts of the instant case, it is unnecessary to discuss at length respondent's argument that the lawyers' fees in question were personal and family expenses within the meaning of section 24(a)(1). The cases relied on by the Commissioner on brief and in I. T. 3856, 1947-1 C. B. 23, are distinguishable either on the facts presented or by the circumstance that neither section 23(a)(2) nor section 22(k) was part of the revenue laws when the cases were decided. *Cf. David G. Joyce*, 3 B. T. A. 393; *Henry Sanderson*, 23 B. T. A. 304; *affd.*, 63 Fed. (2d) 268; *Fred S. Markham*, 39 B. T. A. 465; *Ralph D. Hubbard*, 4 T. C. 121; *Mildred A. O'Connor*, 6 T. C. 323. Moreover, the evidence shows that the legal expense incurred by the petitioner herein was solely for the purpose of producing or collecting increased alimony for past and future years and *was in no respect paid in connection with the personal marital difficulties of petitioner and her husband, which had been settled by separation and divorce over three years before the suit in question was commenced by the petitioner.* * * *” (Emphasis added.)

Similarly, in the present case, any personal marital difficulties of petitioner and his ex-wife had been settled by divorce on November 5, 1938 [R. 36], more than three years before the start of the controversy giving rise to the expenses in question here. We desire to emphasize that here, as in the *Gale* case, the later litigation over alimony had nothing whatever to do with the divorce. As the Supreme Court of California stated in *Howard v. Howard*, 163 P. 2d 439, 440—

“* * * Defendant filed an answer and cross-complaint attacking the money provisions, but not the divorce provisions, of the Nevada decree * * *”

and—

“Defendant concedes that the divorce provisions of the Nevada decree are not open to attack * * *.”

Hence, here as in the *Gale* case, the litigation was concerned only with the ex-wife's attempt to collect alimony and the husband's efforts to resist the collection.

On the same day the *Gale* case was promulgated the Tax Court, in a unanimous reviewed opinion, also decided the case of *Barbara B. LeMond*, 13 T. C. 670. The wife in that case paid counsel fees of \$7,500.00 and \$3,000.00 during the years 1943 and 1944, respectively, for services in negotiating a financial settlement and separation agreement. These fees were not for services in obtaining a divorce, which was obtained in 1943. The Court held that 80 per cent of the fees were deductible, since that was the percentage of the total alimony to be received under the agreement that would be taxable to the wife.

And in concluding its opinion the Court made this pertinent observation at page 674:

“* * * the attorneys to whom the fees in question were paid were solely concerned with the financial aspects of the separation, rather than with the settlement of the personal or marital difficulties of the petitioner and her husband. Therefore, it is our opinion that no part of the legal expenses herein constituted personal family expenses and that no allocation of the legal fees in that respect is necessary.”

In view of these authorities it is incomprehensible to counsel for the Petitioner how the Tax Court can hold that expenses incurred by a divorced wife, in the type of controversy here involved, are not personal and yet hold that expenses of the same character are “personal expenses” if incurred by a divorced husband, particularly where both parties incur the expenses in the same identical controversy. Since deductions of the fees and expenses should not be disallowed as personal expenses under Section 24(a)(1) of the Internal Revenue Code, which is the only ground for disallowance advanced by the Tax Court, the only remaining question is whether the deductions are authorized in the case of the husband by Section 23(a)(2) of the Code.

Although there is no suggestion that Respondent contends that the expenses incurred by Petitioner for fees and costs are other than “ordinary and necessary,” such expenses have long been established as being both “ordinary” and “necessary” within the meaning of those terms as used in Section 23(a)(1) of the Code. (*Kornhauser v. United States*, 276 U. S. 145; *Welch v. Helvering*, 290 U. S. 145.) The Supreme Court stated in the *Welch*

case that though a lawsuit may happen only once in a lifetime, nonetheless, "the expense is an ordinary one, because we know from experience that payments for such purposes, whether the amount is large or small, are the common and accepted means of defense against attack."

Traditionally, alimony was deemed to be an allowance for the nourishment of a wife *out of the income of the husband*. This concept has been adopted in the Internal Revenue Code by the enactment of the alimony amendments in the Revenue Act of 1942. Pursuant to said Act, Section 22(k) of the Code has provided in effect that monthly payments of alimony under a decree of divorce to a divorced wife "shall be includible in the gross income of such wife"; and, correspondingly, Section 23(u) of the Code has authorized a deduction from the gross income of the husband of amounts thus "includible under Section 22(k) in the gross income of his wife * * *." In recommending such amendments, the Senate Finance Committee stated in its report (Senate Report No. 1631, 77th Cong., 2nd Session, 1942-2 C. B. 568):

"These amendments are intended to treat such payments as income to the spouse actually receiving or actually entitled to receive them and to relieve the other spouse from the tax burden upon whatever part of the amount of such payments is under the present law includible in his gross income. * * *"

The property settlement agreement in the instant case shows that the parties contemplated the payment of alimony from Petitioner's income and had reference to the prospective amount of such income in determining the

monthly sum agreed upon. Thus, the parties agreed [R. 42-43]:

“That the first party and her counsel are fully advised that the income of the second party is derived in large measure from the automobile industry, that they have had access to his accounts and records and are informed as to the past and present income and that the provisions hereinafter made for the support and maintenance of the first party and their children are made advisedly and with full knowledge that the income of said second party is subject to extreme fluctuation.”

In other words, the parties contemplated that Petitioner would realize income and would pay \$1,250.00 of it monthly to his ex-wife; and in resisting continued payments after 1941 Petitioner was attempting to retain his entire income. This is precisely the contemplation now held in the Code regarding alimony payments: if they are paid they are included in the wife's gross income and are deductible from the husband's gross income, whereas if he does not pay them there, of course, is nothing to include in the wife's gross income and the husband's gross income is not diminished.

The significance of the above facts lies in the principle established by the Tax Court that expenses incurred in an effort to *retain* taxable income are as much deductible as are those incurred in producing the income in the first instance. In *William A. Falls*, 7 T. C. 66, attorneys' fees for defending the right to retain income received from the use of patents were held deductible on the ground that such expenditures were for the “production or collection of income.” The Court stated at page 71:

“The royalties were collected as income and presumably were reported as income by petitioner and

his associates in the years in which received. As stated in *Estate of Frederick Cecil Bartholomew*, 4 T. C. 349, 359 (appeal dismissed, 151 Fed. (2d) 534):

“* * * It seems reasonable to hold that any litigation which sought to increase the production of income, or to protect the right to income produced, being produced, or to be produced, or to prevent others from acquiring a right, title, or interest, therein would be proximately related to “the production or collection of income” specified in section 121. * * * ”

The Petitioner maintains that, as applied to the present case, the controversy in essence was who was entitled to a certain portion of his taxable income; and inasmuch as the wife's attorneys' fees would be deductible in attempting to collect such taxable income, the husband's attorneys' fees in attempting to retain such taxable income are also deductible.

It is also significant that at the time Anita Z. Howard commenced her action against the Petitioner she obtained writs of attachment or garnishment with respect to the Petitioner's business and the house which he had held for rental or sale ever since the divorce [R. 60]. In resisting such demands Petitioner contends that he was attempting to maintain and conserve the income-producing property that was thus attached or garnished.

In view of the foregoing we respectfully submit that the fees and expenses incurred by Petitioner in defense of the alimony action are deductible as non-trade or non-business expenses within the meaning of Sections 23(a)(2) of the Internal Revenue Code.

II.

The Tax Court Erred in Its Findings of Fact in Respect to the Amounts Incurred and Paid as Legal Expenses in Connection With the Court-Martial Proceedings, Which Amounts the Lower Court Held Were Deductible as Business Expenses.

The Tax Court found, among other things,

“that petitioner incurred and paid legal expenses in the amount of \$3,522.80 in 1943 and \$2,550.00 in 1944 in connection with the Court Martial proceedings * * *.”

The evidence in this proceeding is uncontradicted that in addition to said amounts the Petitioner paid the sum of \$5,000.00 to Walter McGovern on September 14, 1943, one-half of which was for services in connection with the Court-Martial proceedings. This Honorable Court's attention is respectfully directed to the following testimony of the Petitioner on direct and cross-examination [R. 58-59; 64-65]:

“Q. I call your attention to the next one, which is a payment dated September 14, 1943, a \$5,000 by check 7890 issued to Walter McGovern; and I will ask you if Walter McGovern was your attorney? A. He was.

Q. Did he represent you both in the civil suits as well as in the court-martial? A. That's correct.

Q. Do you have any recollection as to what that was paid for, that \$5,000? A. The \$5,000 was for expense on the court-martial and the civil case, and also as a retainer in both cases.

Q. Can you make any allocation or any recollection of what portion of that was for court-martial and what portion for the other? A. Well, my judgment would be that it was about half and half.

Q. I see. He was handling both cases at the same time? A. That's right.” [R. 58-59.]

“Q. Then in September you testified—September 14, 1943—you paid \$5,000 to Walter McGovern. Was your testimony that that was partly for the court-martial and partly for the civil suit? A. That’s correct.

Q. How do you know? A. Mr. McGovern told me that.

Q. Did he render you any statement for that \$5,000? [15] A. He did.

Q. Did he segregate it as between the court-martial proceedings and the civil proceedings? A. No, he didn’t.

* * * * *

Q. (By Mr. Melville): The court-martial proceedings wasn’t entitled Howard versus Howard? [16] A. They were as far as Mr. McGovern was concerned. All his bills were made out the same way.” [R. 64-65.]

Thus, we have uncontradicted testimony that of the \$5,000.00 paid to Walter McGovern on September 14, 1943, one-half (or \$2,500.00) was charged by the attorney and paid by Petitioner for services rendered in connection with the Court-Martial proceedings. This fact is not contradicted at all by the circumstance that the entry book of account reflects payment of \$5,000.00 to Walter McGovern for legal services in *Howard v. Howard*. The testimony of Petitioner shows that said attorney included his services in connection with the Court-Martial proceedings with those he entitled “*Howard v. Howard*,” because, as the Tax Court found [R. 74], the Court-Martial proceedings were instigated at the behest of the divorced wife and hence, in a broad sense, grew out of and were part of “*Howard v. Howard*.” We respectfully submit that the Tax Court was bound by Petitioner’s uncontradicted testimony.

III.

A Finding of Fact Shall Be Set Aside Where, After Due Regard Is Given to the Opportunity of the Trial Court to Judge the Credibility of the Witness, the Finding Is Clearly Erroneous. Said Finding That All of the \$5,000.00 Paid by Petitioner to Walter McGovern Is Solely in Connection With the Civil Litigation, Is Clearly Erroneous.

The effect of Section 1141(a) of the Internal Revenue Code providing that jurisdiction of the Court of Appeals to review decisions of the Tax Court shall be in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury, is to read into said Section the Federal rule that findings of fact shall not be set aside unless clearly erroneous, and that due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses. (*Grace Bros. v. Commissioner* (C. C. A. 9, 1949), 173 F. 2d 170.)

The Supreme Court has said that, "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (*United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746.) The rule has long been established that uncontradicated testimony must be followed. (*Chesapeake & Ohio Railway Company v. Martin*, 283 U. S. 209, 216, 217, 51 S. Ct.

453, 75 L. Ed. 983; *San Francisco Association for Blind v. Industrial Aid for the Blind*, 152 F. 2d 532, 536.)

It is respectfully submitted that Petitioner's testimony, that one-half of the sum of \$5,000.00 paid to Walter McGovern was incurred in connection with the Court-Martial proceedings, is uncontradicted, and that the Tax Court's finding or determination that all, or any amount in excess of one-half, of said sum was incurred in connection with the civil litigation is not supported by substantial evidence, or any evidence at all, and is clearly erroneous.

Conclusion.

There is no substantial evidence or evidence legally sufficient to sustain the finding of the Tax Court that Petitioner paid all, or any amount in excess of one-half, of the sum of \$5,000.00 to Walter McGovern in connection with the civil litigation. The finding is arbitrary.

In arriving at the finding the Tax Court ignored the unimpeached and uncontradicted testimony of the Petitioner, which, if considered at all, would preclude such a finding. Evidence which is material, relevant, probable, consistent, uncontradicted and not discredited cannot be disregarded or ignored by the Trial Court. In addition, the Tax Court's decision that the expenses incurred by Petitioner in connection with the civil litigation are not deductible on the ground that they are personal in nature is erroneous as a matter of law and must be reversed. The decision is arbitrary in view of the Court's earlier

decisions that legal fees paid by an ex-wife to obtain alimony are not personal in nature and are deductible as a non-business expense.

Dated October 31, 1951.

Respectfully submitted,

A. CALDER MACKAY,
ARTHUR MCGREGOR,
HOWARD W. REYNOLDS,
ADAM Y. BENNION,
RICHARD N. MACKAY,

Counsel for Petitioner.

No. 13046

United States
Court of Appeals
for the Ninth Circuit.

ROBERT CARL GETLIN, Administrator of the
Estate of CORINNE CONSTANCE GETLIN,
Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY, a Corpo-
ration,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED
OCT 18 1951

PAUL P. O'BRIEN
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

ANDERSON & FRANKLIN, and

W. A. FRANKLIN,

317 SW Alder Street,

Portland, Oregon,

Attorneys for Appellant.

CAKE, JAUREGUY & TOOZE, and

HERBERT C. HARDY,

1220 Equitable Building,

Portland, Oregon,

Attorneys for Appellee.



In the District Court of the United States
for the District of Oregon

Civil 5776

ROBERT CARL GETLIN, Administrator of the
Estate of CORINNE CONSTANT GETLIN,
Deceased,

Plaintiff,

vs.

MARYLAND CASUALTY COMPANY, a Corpo-
ration,

Defendant.

COMPLAINT

For cause of action against defendant, plaintiff
alleges:

I.

That during all the times herein mentioned defendant was and now is a corporation, organized under the laws of the State of Maryland, and engaged, among other things, in the business of issuing policies of automobile indemnity insurance in favor of the owners of automobiles in the State of Oregon and other localities.

II.

That at all times herein mentioned, and on or about the 31st day of August, 1947, one Harold M. Kalahar was the owner of a certain 1946 model Chevrolet station wagon; that prior to the 31st day of August, 1947, defendant issued to said Harold M. Kalahar its policy of automobile indemnity in-

surance, the number of which is unknown to this plaintiff, but well known to defendant, in which said policy of insurance the defendant agreed to indemnify the said Harold M. Kalahar against any liability not exceeding the sum of \$50,000, which should arise against the said Harold M. Kalahar in favor of any person or persons who should sustain personal injury, or in favor of the personal representative of any person killed by accident by reason of the ownership, maintenance or use by the said Harold M. Kalahar, or by anyone else with the consent of said Harold M. Kalahar, of said automobile; that said policy of automobile indemnity insurance issued as aforesaid by defendant to said Harold M. Kalahar was in full force and effect covering the use of said 1946 model Chevrolet station wagon by any authorized person on the 31st day of August, 1947.

III.

That on or about said 31st day of August, 1947, one Philip Rodgers, operating said vehicle with the permission of said Harold M. Kalahar, so negligently and carelessly operated said motor vehicle as to cause the death of one Corinne Constance Getlin; that thereafter by consideration of certain proceedings had in the Circuit Court of the State of Oregon for the County of Multnomah, Probate Department, plaintiff Robert Carl Getlin was by said court appointed administrator of the estate of said Corinne Constance Getlin, deceased, and has qualified, and he is now the duly appointed and acting administrator of said estate; that thereafter said plaintiff, as such

administrator, commenced and maintained an action in the Circuit Court of the State of Oregon in and for the County of Multnomah, against said Harold M. Kalahar and Philip Rodgers for damages on account of the wrongful death of said deceased; that said action was numbered 182988 in the records of said court; that said action was thereafter regularly tried and resulted in a judgment being rendered on or about the 21st day of February 1950, in favor of plaintiff and against the said Harold M. Kalahar and Philip Rodgers in the sum of \$5,000.00, together with taxed costs in the sum of \$153.60; that said judgment was docketed in the office of the county clerk on or about the 21st day of February, 1950, and has become final, and said judgment is now wholly unsatisfied and unpaid.

IV.

That there is now due and owing and unpaid from defendant to plaintiff the sum of \$5,153.60, and interest thereon since the 21st day of February, 1950, no part of which has been paid.

V.

That by reason of the failure of defendant to pay said judgment within a period of six months following the day the same was entered, plaintiff is entitled to recover a reasonable attorney fee in this action; that the sum of \$1,000.00 is a reasonable sum which plaintiff should be allowed by way of attorney fee herein.

VI.

That plaintiff is a citizen of the State of Oregon, and defendant is a citizen of the State of Maryland, and a diversity of citizenship exists between plaintiff and defendant; that the amount in controversy in this cause exceeds the sum of \$3,000.00 exclusive of interest and costs.

Wherefore plaintiff prays for judgment against defendant for the sum of Five Thousand, One Hundred Fifty-three and 60/100 Dollars (\$5,153.60) and interest thereon at the rate of six per cent per annum from February 21, 1950, until paid, and for the further sum of One Thousand Dollars (\$1,000.00) reasonable attorney fees plus his costs and disbursements incurred herein.

LORD, ANDERSON &
FRANKLIN,

By /s/ W. A. FRANKLIN,
Attorneys for Plaintiff.

To the clerk of the above-entitled court:

Plaintiff requests a trial by jury in this cause.

/s/ W. A. FRANKLIN,
Of Attorneys for Plaintiff.

[Endorsed]: Filed October 5, 1950.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, and for answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Answering paragraph I of plaintiff's complaint, defendant admits the same.

II.

Answering paragraph II, the defendant admits that on or about the 31st day of August, 1947, one Harold M. Kalahar was the owner of a certain 1946 model Chevrolet station wagon, but except as herein specifically admitted, the defendant denies each and every allegation, matter and thing contained in said paragraph, and the whole thereof.

III.

Answering paragraph III, the defendant denies that on or about the 31st day of August, 1947, one Philip Rodgers was operating said vehicle with the permission of said Harold M. Kalahar, and further denies that at said time the said Philip Rodgers so negligently and carelessly operated said motor vehicle as to cause the death of one Corinne Constance Getlin, but except as specifically denied herein, the defendant admits the remaining allegations of said paragraph.

IV.

Answering paragraphs IV and V, the defendant denies each and every allegation, matter and thing contained therein, and the whole thereof.

V.

Answering paragraph VI herein, defendant admits the same.

And for a separate answer and defense, defendant alleges as follows:

I.

That during all times herein mentioned, the defendant was and now is a corporation duly organized under the laws of the State of Maryland and duly authorized and admitted to do business in various states, including Oregon and Texas, and as a part of its business is authorized to issue policies of automobile indemnity insurance in favor of owners of automobiles.

II.

That on or about the 31st day of July, 1947, this answering defendant did execute and deliver to Harold M. Kalahar, whose address was 401 Texas Building, Dallas, Texas, a certain automobile public liability policy covering a 1946 Chevrolet Fleet Master station wagon which is the same automobile described in plaintiff's complaint.

III.

That said policy of liability insurance provided certain coverages, subject, however, to the limits of

liability, exclusions conditions and other terms of said policy, including the riders attached thereto. Under "Coverage A—Bodily Injury Liability" said policy provided that the defendant would pay on behalf of the insured all sums which the insured should become obligated to pay by reason of liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury, including death, at any time resulting therefrom sustained by any person or persons caused by accident and arising out of the ownership, maintenance or use of the automobile. Said policy also contained an exclusion which provided that the policy did not apply under coverage A (bodily injury liability) to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment other than domestic of the insured. Said policy further provided that the coverage therein afforded did not apply to any employee with respect to injury to or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

IV.

The policy of insurance above referred to and described was in full force and effect on or about the 31st day of August, 1947, at the time of the death of Corinne Constance Getlin, and there were no other provisions of said policy affecting the exclusion and limitation aforementioned.

V.

That on or about the 14th day of June, 1948, the plaintiff herein commenced an action in the Circuit Court of the State of Oregon for the County of Multnomah, against Harold M. Kalahar and Philip Rodgers, said case being known as Case No. 182-988. In said action the plaintiff sought to recover damages for the death of Corinne Constance Getlin which occurred in an accident occurring on August 31, 1947, when the decedent was riding in the 1946 model Chevrolet station wagon hereinabove described owned by the defendant Harold M. Kalahar and operated by the defendant Philip Rodgers.

VI.

In said complaint above described, the plaintiff alleged that at the time of the decedent's death, plaintiff (meaning decedent) was "employed by defendant Harold M. Kalahar as a solicitor" and was provided with transportation from place to place in a vehicle owned by the defendant Harold Kalahar, and further alleged that said defendant Harold M. Kalahar did furnish the plaintiff (meaning decedent) with free transportation from state to state and from city to city, and that said transportation was a part of the compensation paid plaintiff (meaning decedent) for her services, and that in addition to the commissions and transportations, the defendant Harold M. Kalahar did furnish a driver to transport plaintiff (meaning decedent) from place to place. That in said complaint the plaintiff further alleged that at the time of the

accident the plaintiff (meaning decedent) was being transported from Pendleton, Oregon, to The Dalles, Oregon, and that said transportation was pursuant to the plaintiff's (meaning decedent's) contract of employment with the defendant Harold M. Kalahar. Said complaint further alleged that due to the negligence of both of defendants the decedent was killed and that thereafter the plaintiff in this case was duly appointed the administrator of the estate of said deceased.

VII.

Thereafter, this defendant did advise its assured Harold M. Kalahar, and his driver Philip Rodgers that the plaintiff's complaint was based upon an employer and employee relationship between Kalahar and the decedent and Kalahar and Rodgers. Defendant further advised the said Kalahar and Rodgers that it would not pay any judgment based on such a relationship because of the provisions of its policy hereinabove described, and that any defense furnished by this defendant would be made under a full reservation of right to refuse to pay any judgment, and that this defendant did not waive said rights by proceeding with the defense of such case. It further advised both said Kalahar and Rodgers that each had the right to engage his own attorneys to defend said action. Neither Kalahar nor Rodgers engaged attorneys to defend said action.

VIII.

On or about the 17th day of June, 1949, the plain-

tiff filed an amended complaint substantially the same as the original complaint hereinabove described. The changes made in the amended complaint were limited to substituting the name or description of the decedent in lieu of the word plaintiff; adding three allegations of negligence; making some changes in the damages alleged, and the description of the action.

IX.

Thereafter, the defendant herein instructed its attorneys, Cake, Jaureguy & Tooze and Herbert C. Hardy, to undertake the defense of said case on behalf of the said Kalahar and Rodgers, and said attorneys did thereafter on their behalf interpose an answer to the amended complaint above described denying generally the allegations in plaintiff's amended complaint.

X.

Thereafter, on or about the 6th day of February, 1950, the said case came on for trial before the Honorable Charles W. Redding, Judge of the Circuit Court of the State of Oregon for the County of Multnomah, and said case was tried to a jury, and on the 8th day of February, 1950, the Honorable Judge Redding instructed the jury in said case that the plaintiff was bound to prove the allegations of his complaint which had been denied by the defendant, and particularly instructed the jury that before the jury could bring in any verdict in said case against the defendant Kalahar, that they must find that the defendant Philip Rodgers was an

employee of the defendant Kalahar, and also that the decedent Corinne Constance Getlin was an employee of the defendant Kalahar.

XI.

Thereafter, the jury retired and did find a verdict in favor of plaintiff Getlin against both of the defendants Kalahar and Rodgers, and based upon said verdict a judgment was rendered in said case on or about the 21st day of February, 1950, in favor of the plaintiff and against the said Harold M. Kalahar and Philip Rodgers in the sum of \$5,000.00, together with costs taxed in the sum of \$153.60, which judgment was docketed in the office of the County Clerk on or about the 21st day of February, 1950, and has become final, and which is the judgment upon which the present plaintiff bases his complaint herein.

XII.

That by reason of the foregoing facts, the policy issued by the defendant to Harold M. Kalahar does not cover the judgment rendered against either Harold M. Kalahar or the defendant Philip Rodgers, and therefore no sums are due from the defendant to the plaintiff.

Wherefore, the defendant having fully answered the plaintiff's complaint, demands that the plaintiff take nothing thereby and that judgment be rendered against the plaintiff and in favor of the de-

pendant for its costs and disbursements incurred herein.

CAKE, JAUREGUY & TOOZE,

By /s/ HERBERT C. HARDY,

Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 24, 1950.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

On December 18, 1950, a pre-trial conference was held in open Court before the undersigned Judge of this Court. Plaintiff appeared by his attorney, Wesley Franklin, of Lord, Anderson and Franklin, and defendant appeared by its attorney, Herbert C. Hardy, of Cake, Jaureguy & Tooze.

Agreed and Stipulated Facts

1. Defendant was at all times herein pertinent, and now is a corporation organized under the laws of the State of Maryland, and is authorized and licensed to do business in Oregon and Texas, and as a part of its business to issue policies of automobile liability insurance in favor of owners of automobiles.

2. The plaintiff is the duly appointed, qualified and acting administrator of the Estate of Corinne Constance Getlin, deceased, by virtue of proceed-

ings in the Circuit Court of the State of Oregon, County of Multnomah, Probate Department, and is a citizen of the State of Oregon.

3. At all times mentioned herein, one Harold M. Kalahar, hereinafter referred to as Kalahar, was the owner of a 1946 Chevrolet station wagon.

4. At all times herein pertinent, there was in full force and effect a certain automobile public liability policy issued by the defendant herein to Kalahar and covering the above-described 1946 Chevrolet station wagon. The photostatic copy of the automobile policy basic liability form of the Maryland Casualty Company of Baltimore, together with the photostatic copy of the Home Office copy of the specifications regarding the policy limits, the description of the assured and his vehicle and the photostatic copy of the rider (form 158) attached to said automobile policy, all of which comprise defendant's Exhibit A, constitute a genuine and accurate reproduction of the automobile public liability policy issued by defendant to Kalahar, and constitute the policy of liability insurance on which plaintiff relies in this action.

5. At various dates in July, 1947, Kalahar did hire various persons in Iowa and Nebraska for the purpose of soliciting magazine subscriptions in various towns from state to state throughout the entire Western United States. Included in the group of persons so hired were the decedent, Corinne Constance Getlin and one Philip Rodgers. Kalahar did furnish free transportation to said

solicitors from state to state and city to city. Kalahar also designated one of such persons to serve as a driver in the transportation of said solicitors, and at all times herein pertinent Philip Rodgers was designated as the driver of and was driving the 1946 Chevrolet station wagon, but as such driver he received no additional compensation.

6. On August 31, 1947, the decedent, together with Rodgers and several other magazine soliciting employees of Kalahar, were being transported in said 1946 Chevrolet station wagon from Spokane, Washington, where they had been soliciting magazine subscriptions, to Portland, Oregon, where they were to do like soliciting. Said transportation was pursuant to their respective contracts of employment with Kalahar.

7. While decedent was thus en route from Spokane to Portland in said 1946 Chevrolet station wagon with several other employees of Kalahar, an accident occurred between the 1946 Chevrolet station wagon then being driven by Philip Rodgers, and another vehicle. As a result of that accident, the decedent was killed.

8. On June 16, 1948, the present plaintiff commenced an action against Kalahar and Philip Rodgers by the filing of a complaint for damages for the wrongful death of the decedent, Corinne Constance Getlin, in the Circuit Court of the State of Oregon, for the County of Multnomah, said case being numbered 182-988. An amended complaint was filed in said action on June 20, 1948, which

changed no allegations pertinent to the present case.

9. In said complaint the plaintiff alleged that Kalahar did hire certain salesmen, paid them on a commission basis and in connection with said employment did furnish free transportation to said solicitors from state to state and city to city, said transportation being a part of the compensation paid solicitors for their services; that Corinne Constance Getlin was so employed and that at the time of the accident and her death, was being transported in Kalahar's car driven by Rodgers, pursuant to her contract of employment with Kalahar; that Kalahar and Rodgers were guilty of negligence which caused decedent's death, wherefore plaintiff demanded \$10,000 in damages.

10. The defendant herein, Maryland Casualty Company, after the filing of said complaint, advised Kalahar in writing that the complaint was based on an employer-employee relationship between Kalahar and the decedent and that it would not pay any judgment against Kalahar based on such a relationship because of the provisions of the Exclusion section of said policy which provided that the policy did not apply

“(d) under coverages A and X, to bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured, * * *”

The defendant herein further advised the said Kalahar that any defense furnished by it in said action would be under a full reservation of right to refuse

to pay any judgment, and that it did not waive any of its rights by proceeding with the defense of such case. The present defendant further advised Kalahar that he had a right to engage his own attorney to defend said action, but Kalahar did not do so.

11. The defendant herein, after the filing of said complaint, also advised Philip Rodgers, the co-defendant in the action in the Circuit Court, that the complaint was based on an employer-employee relationship between Kalahar and the decedent and Kalahar and Rodgers, and that it would not pay any judgment against Rodgers founded on such relationship because of a limitation in the definition of the persons insured that the insurance provided did not apply

“(d) to any employee with respect to injury to or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.”

The defendant herein further advised the said Philip Rodgers that any defense furnished by it would be under a full reservation of rights to refuse to pay any judgment, and that it did not waive any of its rights by proceeding with the defense of such case. It further advised Rodgers that he had the right to engage his own attorney to defend said action, but Rodgers did not do so.

12. Thereafter, this defendant did cause its attorneys, Cake, Jaureguy & Tooze and Herbert C.

Hardy, to interpose an answer in said case in the Circuit Court of the State of Oregon for the County of Multnomah, which answer denied all of the allegations of the plaintiff's complaint therein.

13. On February 6, 1950, said case came on for trial in said Court before the Honorable Charles W. Redding and was tried by a jury. After both parties had rested in said case, the trial judge instructed the jury on the issues of the case and specifically instructed them as follows:

"I instruct you that before you can bring in any verdict in this case against the individual defendant Harold M. Kalahar you must also find that the defendant Philip Rodgers was an employee of the defendant Kalahar and also that the decedent, Corinne Constance Getlin, was also an employee of the defendant Kalahar as I shall later define that relationship to you.

"You are instructed that in determining whether or not the decedent, Corinne Constance Getlin, and the defendant Philip Rodgers were employees of the defendant Harold M. Kalahar, the test as to the existence of the relationship is whether there is an understanding between the parties that one is to render personal services to or for the benefit of the other and recognition by them of the right of Harold M. Kalahar to order and control the other in the performance of the work and to direct the manner and method of its performance."

14. Thereafter, the jury did take said case under

consideration and did render its verdict in favor of the plaintiff and against the defendant Kalahar and the defendant Rodgers, and each of them, and adjudged the plaintiff's damages in the sum of Five Thousand Dollars (\$5,000). Based upon said verdict, the Honorable Charles W. Redding did on the 21st day of February, 1950, enter a judgment in favor of the present plaintiff against the said Harold M. Kalahar and Philip Rodgers, and each of them, in the sum of Five Thousand Dollars (\$5,000), together with plaintiff's costs and disbursements in the amount of One Hundred, Fifty-three Dollars, Sixty Cents (\$153.60), which judgment was entered in the journal on February 21, 1950, and docketed on February 23, 1950, in Book 46, page 127, and is the judgment upon which the plaintiff bases this present action.

15. The defendant herein has refused to pay to the plaintiff said judgment, or any part thereof.

Stipulation

It is stipulated by and between the parties hereto that the defendant's policy does not cover the defendant Rodgers and therefore regardless of the outcome of this lawsuit so far as the defendant Kalahar is concerned, no judgment can be rendered in this case against the defendant Maryland Casualty Company based upon the judgment against Philip Rodgers.

Statement of Issue

It is agreed by both parties that the only issue involved in this case is whether or not, at the time

of the death of the decedent, the decedent was “engaged in the employment of the insured,” Kalahar, within the meaning of the policy.

Plaintiff's Contention

Plaintiff's contention on the foregoing issue is that under the foregoing stipulated statement of facts, decedent was not so engaged at the time of the accident.

Defendant's Contention

1. Defendant contends that the question of whether or not plaintiff was “engaged in the employment of the insured,” within the meaning of the policy at the time of the accident, was determined in the action brought by the plaintiff against Kalahar and Rodgers in the Circuit Court of the State of Oregon for the County of Multnomah, and that the same is *res judicata* and cannot be considered by this Court.

2. Defendant's alternative contention is that the decedent was “engaged in the employment of the insured,” Kalahar, within the meaning of the policy at the time of the death of the decedent.

Exhibits

The following exhibits are below enumerated and identified and no further identification will be required at the time of the trial, and it is stipulated between the parties that the documents are authentic, and in case of copies that they are true copies

of the original and shall have the same effect as if they were originals.

The plaintiff has no exhibits.

The following defendant's exhibits shall be admitted without objection:

Defendant's Exhibit A: Exhibit A, consisting of six photostatic pages, the first four of which are standard automobile insurance policy issued by defendant to Kalahar, to which is attached one photostatic page being a copy of the home office records showing the coverage, and one folded photostatic page being a rider to said policy known as form 158.

It is stipulated that the typewritten inserts on the home office work sheet concerning the amount of coverage, the name of the insured, the vehicle covered and the period of the policy and the identification of riders attached were part of the original policy issued to Kalahar.

Defendant's Exhibit B: Exhibit B, consisting of 13 photostatic pages, which is a certified copy of all the pleadings and documents in the case of Getlin vs. Kalahar and Rodgers in the Circuit Court of the State of Oregon, for the County of Multnomah, Case No. 182-988, consisting of the Complaint, Amended Complaint, Answer to Amended Complaint, Verdict and Judgment Order, all of which have been certified by the County Clerk of Multnomah County.

Defendant's Exhibit C: Exhibit C, consisting of three pages, which is the letter of reser-

vation of rights sent by Maryland Casualty Company to and received by Harold M. Kalahar.

Defendant's Exhibit D: Exhibit D, consisting of three pages, which is the letter of reservation of rights sent by Maryland Casualty Company to and received by Philip Rodgers.

Defendant's Exhibit E: Exhibit E, being a certified copy of all of the instructions to the jury given by the Honorable Charles W. Redding in the case of Robert Carl Getlin, Administrator, vs. Harold M. Kalahar and Philip Rodgers, in the Circuit Court of the State of Oregon for the County of Multnomah, bearing Clerk's No. 182-988.

Based upon said pre-trial hearing, It Is Hereby Considered, Ordered and Adjudged that this pre-trial order shall govern the proceedings and trial in the above-entitled action and that there are no issues of law or fact except as set forth in this order. This pre-trial order shall not be amended during the trial except by consent or to prevent manifest injustice.

Dated this 8th day of January, 1951.

/s/ GUS J. SOLOMON,

United States District Judge.

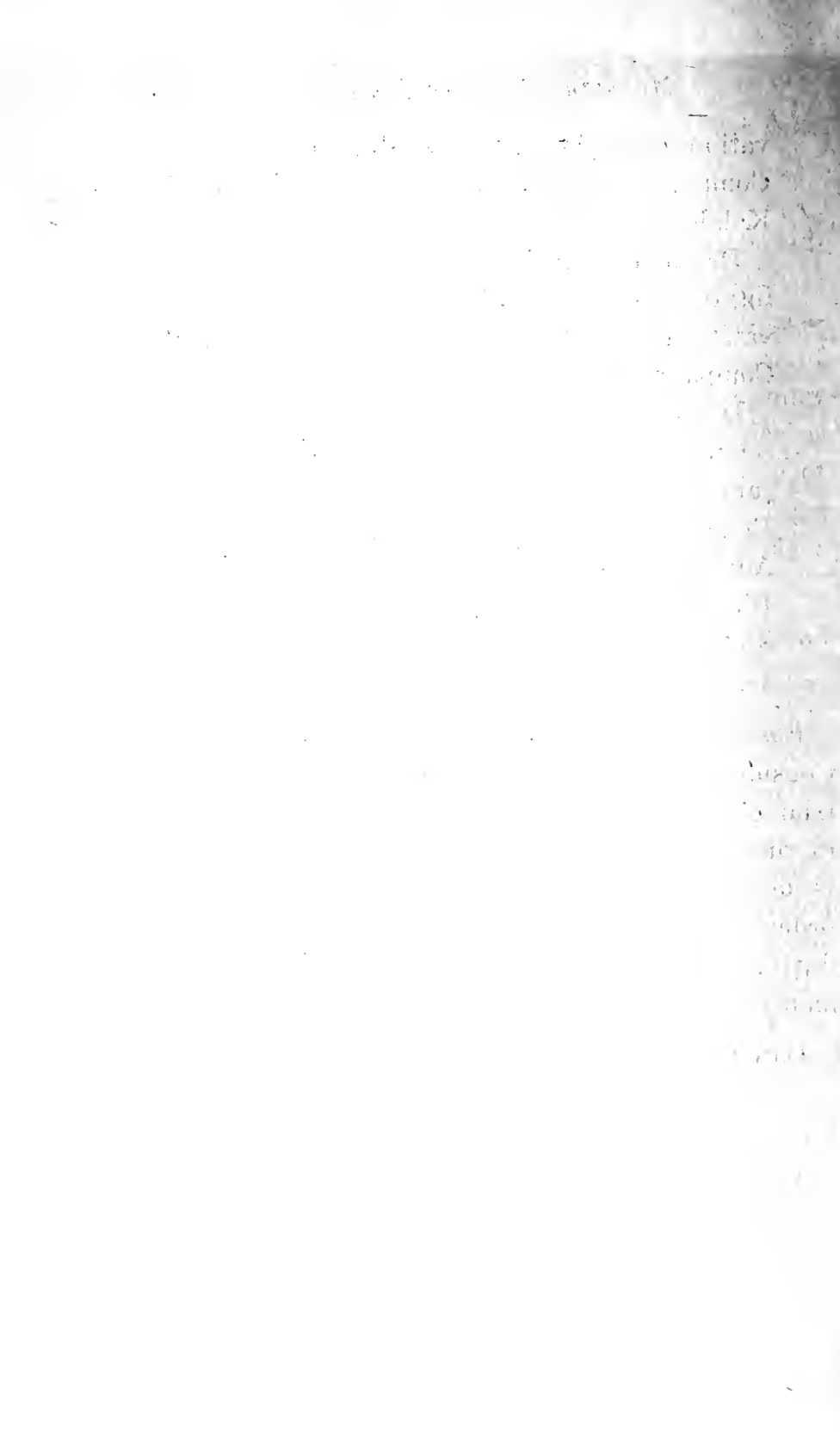
Approved:

By /s/ W. A. FRANKLIN,

Of Attorney for Plaintiff.

By /s/ HERBERT C. HARDY,

Of Attorneys for Defendant.



AUTOMOBILE POLICY

Basic Liability Form

Maryland Casualty Company

BALTIMORE

Policy No. 00

DECLARATIONS

Renewal of

1. Name of Insured

Address (No. Street Town or City Zone No. County State)

Automobile will be principally garaged in the above town or city, county and state, unless otherwise stated herein:

Named insured is Occupation of the named insured is (If married woman, give husband's occupation or business)

2. Policy Period: From to 19:01 A. M.
Standard Time at the address of the named insured as stated herein.

3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific amount charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

COVERAGES	A—Bodily Injury Liability	B—Property Damage Liability	X—Medical Payments
AMOUNTS OF LIABILITY	\$ each person \$ each accident	\$ each accident	\$ each person

4. Description of the automobile

Trade Name	Model		Body Type; Truck Size; Tank Gallonage Capacity; or Bus Seating Capacity	Serial No. (S) and Motor No. (M)	Premiums		
	Year	Series			Coverage A Bodily Injury Liability	Coverage B Property Damage Liability	Coverage X Medical Payments
					\$	\$	\$
In numbers of printed endorsements forming a part of the policy on its effective date:					Totals	\$	\$
					Special charge as per endorsement attached	\$	
					Total Premium \$		

5. The purposes for which the automobile is to be used are

The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as use principally in the business occupation of the named insured as stated in Item 1, including occasional use for personal, pleasure, family and other business purposes. (c) Use of the automobile for the purposes stated includes the loading and unloading of the automobile.

6. The risk was insured during the past year in

7. (a) Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile; (b) during the past year no insurer has canceled any automobile insurance issued to the named insured. Option, if any, to (a) or (b):

Insured or Agent Countersigned this day of 19

(Give Code No. and Name)

by

Authorized Representative.

MARYLAND CASUALTY COMPANY

(A Stock Insurance Company, hereinafter called the company)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this

INSURING AGREEMENTS

COVERAGE A—BODILY INJURY LIABILITY

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed on him by law for damages, including damages for care and services, because of bodily injury, including death at the time resulting therefrom, sustained by any person or persons caused by accident and arising out of the ownership, maintenance or use of the automobile.

COVERAGE B—PROPERTY DAMAGE LIABILITY

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed on him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

COVERAGE X—MEDICAL PAYMENTS

To pay to or for each person who sustains bodily injury, caused by accident, while in or upon, entering or alighting from the automobile classified as "pleasure and business" if the injury arises out of the use thereof by or with the permission of the named insured, or (2) any other private passenger automobile with respect to the use of which insurance is afforded under Insuring Agreement V of this policy, if the injury arises out of the use thereof and results from (a) the operation of the automobile by the named insured or spouse or by a private chauffeur or domestic servant of either or (b) the occupancy of the automobile by the named insured or spouse, the reasonable expense of necessary medical, surgical, ambulance, hospital, professional nursing services and, in the event of death resulting from such injury, the reasonable funeral expense, all incurred within one year from the date of accident.

The insurance afforded with respect to such other automobiles shall be excess insurance over any other valid and collectible medical payments insurance applicable thereto.

Settlement, Supplementary Payments

With respect to such insurance as is afforded by the other terms of this policy under coverages A and B the company shall defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

To pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

To reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request. The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.

Definition of "Insured"

The unqualified word "insured" wherever used in coverages A and B and in other parts of this policy, when applicable to coverages, includes the named insured and, except where specifically stated to the contrary, also includes any person using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured. Insurance with respect to any person or organization other than the named insured does not apply:

To injury to or death of any person who is a named insured; with respect to the automobile while used with any trailer not covered by like insurance in the company; or with respect to any trailer covered by this policy while used with any automobile not covered by like insurance in the company;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(d) to any employee with respect to injury to or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

Automobile Defined, Trailers, Two or More Automobiles

Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semitrailer described in this policy. The word "trailer" shall include semitrailer.

Such insurance as is afforded by this policy for bodily injury liability and for property damage liability with respect to a private passenger automobile applies also to a trailer not described in this policy while used with such automobile, if such trailer is designed for use with a private passenger automobile and is not a home, cabin, office, store, product or process display, demonstration or passenger trailer. While not used with such automobile, such insurance applies also to such trailer but only with respect to the named insured and does not apply to the use of the trailer in his business occupation or with an automobile of the commercial or truck type owned or used by him.

When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respect limits of liability under coverages A and B.

Use of Other Automobiles

Such insurance as is afforded by this policy for bodily injury liability and for property damage liability with respect to the automobile classified as "pleasure and business" applies (1) to the named insured, if an individual and the owner of such automobile, or if husband and wife either or both of whom own such automobile, and (2) to the spouse of such individual if a resident of the same household, to the employer of such named insured or spouse and to the parent or guardian of such named insured or spouse, if a minor, as insured, with respect to the use of any other automobile by or in behalf of such named insured or spouse.

This insuring agreement does not apply:

(a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

(b) with respect to such employer, parent or guardian, to any automobile owned in full or in part by him or registered in his name or hired by him as part of a frequent use of hired automobiles;

(c) to any automobile not of the private passenger type while used in the business or occupation of the named insured or spouse, or to any private passenger automobile while used in such business or occupation if operated by a person other than the named insured or spouse or such chauffeur or servant unless the named insured or spouse is present in such automobile;

(d) to any insured other than as defined in this insuring agreement;

(e) to injury to or death of any person who is a named insured;

(f) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place.

Temporary Use of Substitute Automobiles

While an automobile owned in full or in part by the named insured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy with respect to such automobile applies with respect to another automobile not so owned while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner.



Attach endorsements in this space

Insurance for Newly Acquired Automobiles

The named insured who is the owner of the automobile and the ownership of another automobile and so notifies the company within thirty days following the date of its delivery of such insurance as is afforded by this policy applies also to other automobiles as of such delivery date:

If it replaces an automobile described in this policy, but only to the extent the insurance is applicable to the replaced automobile, or

If it is an additional automobile and if the company insures all automobiles owned by the named insured at such delivery date, but only to the extent the insurance is applicable to all such previously owned automobiles.

The insuring agreement does not apply: (a) to any loss at which the named insured has other valid and collectible insurance, or (b) except during the policy period, but if such year date is prior to the effective date of this policy, the insurance applies as of such effective date.

The named insured shall pay any additional premium required because of the application of the insurance to such

other automobile. The insurance terminates upon the replaced automobile on such delivery date.

Policy Period, Territory, Purposes of Use

This policy applies only to accidents which occur during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

Bail Bond Expense

The company shall pay the cost of bonds, but without obligation to apply for or furnish such bonds, guaranteeing the insured's appearance in court if such appearance is required by reason of an accident or a traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under coverage A of this policy. The company's liability under this insuring agreement with respect to each bond shall not exceed the usual charges of surety companies for such bond nor \$100.

EXCLUSIONS

Policy does not apply:

If the automobile is used as a public or livery conveyance, or such use is specifically declared and described in this policy and premium charged therefor;

Liability assumed by the insured under any contract or agreement;

Other coverages A and B, while the automobile is used for towing of any trailer owned or hired by the named insured not covered by like insurance in the company; or while the trailer covered by this policy is used with any automobile owned or hired by the named insured and not covered by like insurance in the company;

(d) under coverages A and X, to bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of the automobile;

(e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;

(g) under coverage X, to bodily injury to or death of any person to or for whom benefits are payable under any workmen's compensation law because of such injury or death.

CONDITIONS

Limit of Liability. Coverage A. The limit of bodily injury stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, in addition to the above provision respecting each person, the total of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by more persons in any one accident.

Limit of Liability. Coverage X. The limit of liability for all payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages incurred by or on behalf of each person who sustains bodily injury, including death resulting therefrom, in any one accident.

Limit of Liability. The inclusion herein of more than one person shall not operate to increase the limits of the company's liability.

Financial Responsibility Laws. Coverages A and B. Such insurance as is afforded by this policy for bodily injury liability property damage liability shall comply with the provisions of any motor vehicle financial responsibility law of any state or territory which shall be applicable with respect to any such injury arising out of the ownership, maintenance or use of an automobile during the policy period, to the extent of the age and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The named insured agrees to reimburse the company for any payment by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

Fault and Battery. Coverages A and B. Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

Notice of Accident. When an accident occurs written notice shall be given by or on behalf of the insured to the company or its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and reasonably obtainable information respecting the time, date and circumstances of the accident, the names and addresses of the injured and of available witnesses.

7. Notice of Claim or Suit. Coverages A and B. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

8. Assistance and Cooperation of the Insured. Coverages A and B. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

9. Medical and Other Reports Examination. Coverage X. The injured person or someone on his behalf shall, as soon as practicable after each request from the company, furnish reasonably obtainable information pertaining to the accident and injury, and execute authorisation to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

10. Proof and Payment of Claim. Coverage X. As soon as practicable after completion of the services or after the rendering of services which in cost equal or exceed the limit of liability for medical payments or after the expiration of one year from the date of the accident, whichever is the first, the injured person or someone on his behalf shall give to the company written proof of claim under oath, stating the name and address of each person and organization which has rendered services, the nature and extent and the dates of rendition of such services, the itemized charges therefor and the amounts paid thereon. Upon the company's request, the injured person or someone on his behalf shall cause to be given to the company by each such person and organization written proof of claim under oath, stating the nature and extent and dates of rendition of such services, the itemized charges therefor and the payments received thereon.

The company shall have the right to make payment at any time to the injured person or to any such person or organization on account of the services rendered, and a payment so made shall reduce to the extent thereof the amount payable hereunder to or for such injured person on account of such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company.

(Continued on reverse side)

VII

IX

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CONDITIONS (Continued)

Action Against Company. Coverages A and B. No action shall be brought against the company unless, as a condition precedent to the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation shall have been finally determined either by judgment or by the insured after actual trial or by written agreement between the insured, the claimant and the company.

Action Against Company. Coverage X. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the company.

Other Insurance. Coverages A and B. If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under Insuring Agreements V and VI shall not exceed the insurance over any other valid and collectible insurance available to the insured, either as an insured under this policy applicable with respect to the automobile or otherwise, or as a loss covered under either or both of said insuring agreements.

Subrogation. Coverages A and B. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instructions and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

Waiver. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by an authorized representative of the company.

16. Assignment. Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under coverages A and B, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of the automobile, as an insured, and under coverage X while the automobile is used by such person, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

17. Cancellation. This policy may be canceled by the named insured by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

18. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, the MARYLAND CASUALTY COMPANY has caused this policy to be signed by its president and countersigned on the declarations page by a duly authorized representative of the company.

Sam C. Bramble
Secretary

Stewart Wexler
President

PLEASE READ YOUR POLICY

Carefully note Conditions requiring Immediate Notice of Every Accident and of Every Suit.

EXPIRES
at 12:01 A.M.
19

ISSUED TO
Maryland Casualty Company

No. 09
A STOCK COMPANY
TEXAS STANDARD
AUTOMOBILE POLICY
Basic Liability Form



CHAS. L. LEXTER & CO. Date Received at RECORDING DEPT. AUG 4 1947
 (State Name of General Agent or Branch Office) MARYEAND CASUALTY COMPANY TEXAS STANDARD AUTOMOBILE APP. Expiration Date

BUREAU OFFICE USE ONLY	Yearly		Class		No. Cars		Premium		Yearly		Class		No. Cars		Premium		Total Prem.	Checked by	
BODILY INJURY PROPERTY DAMAGE COLLISION MEDICAL PAYMENTS	02		141510		1														Approved at H. AUG 8 1947
Trans.	State	City	County	Eng. and Service		B. F. A.		Installation		Credit Report		C. R.							
01	42																		

DECLARATIONS

Item 1. Name of Insured **Harold M. Kolar** Renewal of **8 3 48**
 Address **401 Texas Bank Bldg., Dallas, Dallas, Texas**
 (No. Street Town or City County State)

The automobile will be principally garaged in the above town or city, county and state, unless otherwise stated herein:

The named insured is **Individual** Occupation of the named insured **Salonman**
 (Individual, corporation, or partnership) **Keystone Endorse Society**
 (If member of a fraternal organization, give name of organization and degree)

Item 2. Policy Period: From **July 1 1947** to **July 1 1948** 12:01 A. M.
 Standard Time at the address of the named insured

Item 3. Home Office Reins. **13.04** over Co. Prem.
 Use Only Ceded

COVERAGES	A—Bodily Injury Liability	B—Property Damage Liability	X—Medical Payments
LIMITS OF LIABILITY	\$ 25,000.00 each person \$ 50,000.00 each accident	\$ 5,000.00 each accident	\$ 500.00 each person

Model	Year	Exposure	Rate	Premium	Coverage A Bodily Injury Liability	Coverage B Property Damage Liability	Coverage X Medical Payments
Chevrolet 1946	10	Station Wagon Floor plates	DAA-10350	19.05	12.00	4.50	
Totals				19.05	12.00	4.50	
Total Premium \$				35.55			

Item 5. The purposes for which the automobile is to be used are **Pleasure and Business**

(a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as use principally in the business occupation of the named insured as stated in item 1, including occasional use for personal, pleasure, family and other business purposes. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

Item 6. The risk was insured during the past year in **How**

Item 7. (a) Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile; (b) during the past year no insurer has canceled any automobile insurance issued to the named insured. Exception, if any, to (a) or (b): **No exceptions**

Insured or Sub-Agent **31st July 47**
 (Give Code No. and Name) **PASTE ALL ENDORSEMENTS ON BACK**

158. AMENDMENT OF AUTOMOBILE POLICY

insurable only with respect to such and so many of the coverages as are defined in the policy and for which insurance is afforded as indicated by specific premium charge in Item 3 of the Declarations.)

agreed that the policy is amended as follows:

Declarations

- A. Item 3. Medical Payments Coverage reads:
Medical Payments
- B. Item 4. Description as to size of the automobile reads:
Body Type; Truck Size;
(Truck Load Capacity);
Tank Gallonage Capacity;
or Bus Seating Capacity

Insuring Agreements

- A. The words "bodily injury," and the word "injury" when referring to bodily injury, include "sickness or disease."
- B. The following is added if not provided by the policy:

Bail Bond Expense

The company shall pay the cost of bonds, but without obligation to apply for or furnish such bonds, guaranteeing the insured's appearance in court if such appearance is required by reason of an accident or a traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under bodily injury liability coverage of this policy. The company's liability under this insuring agreement with respect to each bond shall not exceed the usual charges of surety companies for such bond nor \$100.

Medical Payments Coverage reads:

Medical Payments—To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission.

- D. In Insuring Agreement III, Definition of "Insured", divisions (a) and (b) do not apply.

Insuring Agreements headed: "Automobile Defined, Trailers, Two or More Automobiles"; "Use of Other Private Passenger Automobiles"; "Use of Other Automobiles"; "Temporary Use of Substitute Automobile"; and "Automatic Insurance for Newly Acquired Automobiles," are replaced by the following:

IV Automobile Defined, Trailers, Two or More Automobiles

- (a) **Automobile.** Except where stated to the contrary, the word "automobile" means:

- (1) **Described Automobile**—the motor vehicle or trailer described in this policy;
- (2) **Utility Trailer**—under bodily injury liability, property damage liability and medical payments, a trailer not so described, if designed for use with a private passenger automobile, if not being used with another type automobile and if not a home, office, store, display or passenger trailer;
- (3) **Temporary Substitute Automobile**—under bodily injury liability, property damage liability and medical payments, an automobile not owned by the named insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;
- (4) **Newly Acquired Automobile**—an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile.

The word "automobile" also includes under the coverages of comprehensive, collision or upset, fire, theft, windstorm and combined additional coverage its equipment and other equipment permanently attached thereto.

- (b) **Semitrailer.** The word "trailer" includes semitrailer.

- (c) **Two or More Automobiles.** When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability for bodily injury liability and property damage liability and separate automobiles as respects limits of liability, including any deductible provisions, under coverages of comprehensive, collision or upset, fire, theft, windstorm, combined additional coverage and towing and labor costs.

V Use of Other Automobiles

If the named insured is an individual who owns the automobile classified as "pleasure and business" or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provisions:

(See other side)

(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

- (1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;
- (2) to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant;
- (3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;
- (4) under medical payments, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse.

Exclusions

A. In exclusion (c) the words "named insured" are amended to read "insured."

B. Exclusion (d) is amended to read as follows:

- (d) under bodily injury liability and medical payments, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law;

C. Exclusion (g) is amended to read as follows:

- (g) under medical payments, to bodily injury to or sickness, disease or death of any person if benefits therefor are payable under any workmen's compensation law;

D. Exclusion (b) is eliminated.

Conditions

A. The insurance under bodily injury liability and property damage liability with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobiles or otherwise.

B. The insurance afforded under medical payments with respect to other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible medical payments insurance applicable thereto.

This endorsement forms a part of Policy No. 15-109125 issued to Harold M. Kalahar
 the Maryland Casualty Company of Baltimore, Md.
 (Name of Insurance Company)
 and is effective from July 31, 1947
 (12:01 A. M. Standard Time)
 undersigned at Dallas, Texas

(Duly Authorized Representative)

FORM 158—AMENDMENT OF AUTOMOBILE POLICY
 Standard Automobile Endorsement
 Amended Dec. 1, 1947.



EXHIBIT B

In the Circuit Court of the State of Oregon
for the County of Multnomah

No. 182-988

ROBERT CARL GETLIN, Administrator of the
Estate of Corinne Constance Getlin, Deceased,
Plaintiff,

vs.

HAROLD M. KALAHAR and PHILIP
RODGERS,

Defendants.

JUDGMENT ORDER

This cause came on for trial before the Honorable Charles W. Redding, Judge of the above-entitled court, and the jury duly impanelled and sworn on the 6th day of February, 1950, the plaintiff appearing in person and by and through W. A. Franklin, of his attorneys, and the defendants appearing in person and by and through Herbert Hardy and Harold Hutchinson, of their attorneys, whereupon opening statemens of counsel were made and testimony taken, and thereafter the cause was argued by counsel to the jury, and the court instructed the jury as to the law, and the jury retired in charge of a properly sworn officer to consider their verdict, and thereafter the jury returned into court the following verdict:

“In the Circuit Court of the State of Oregon
for the County of Multnomah

No. 182-988

ROBERT CARL GETLIN, Administrator of the
Estate of Corinne Constance Getlin, Deceased,
Plaintiff,

vs.

HAROLD M. KALAHAR and PHILIP
RODGERS,

Defendants.

VERDICT

We, the jury, duly impanelled and sworn to try the above-entitled cause, do find our verdict for the plaintiff and against the defendants and each of them, and assess plaintiff's damages in the sum of \$5,000.

/s/ LEE F. GRIFFITH,
Foreman.”

Now, therefore, based upon said verdict,

It Is Hereby Ordered and Adjudged That plaintiff have of and take judgment against defendants, Harold M. Kalahar and Philip Rodgers, and each of them, in the sum of \$5,000, together with plaintiff's costs and disbursements herein taxed at \$153.60, and that execution issue therefor.

Dated this 21st day of February, 1950.

/s/ CHARLES W. REDDING,
Judge.

State of Oregon,
County of Multnomah—ss.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 21st day of February, 1950.

/s/ HERBERT C. HARDY,
Of Attorneys for Defendants.

[Stamped]: Book 1006, page 158. Judgment docketed Feb. 23, 1950, book 46, page 127 and 202. Entered in Journal Feb. 21, 1950.

In the Circuit Court of the State of Oregon
for the County of Multnomah

No. 182-988

ROBERT CARL GETLIN, Administrator of the
Estate of Corinne Constance Getlin, Deceased,
Plaintiff,

vs.

HAROLD M. KALAHAR and PHILIP
RODGERS,

Defendants.

VERDICT

We, the jury, duly impanelled and sworn to try the above-entitled cause, do find our verdict for the plaintiff and against the defendants and each of

them, and assess plaintiff's damages in the sum of \$5,000.

/s/ LEE F. GRIFFITH,
Foreman.

[Endorsed]: Filed Feb. 9, 1950; Circuit Court,
Oregon.

In the Circuit Court of the State of Oregon
for the County of Multnomah

No. 182-988

ROBERT CARL GETLIN, Administrator of the
Estate of Corinne Constance Getlin, Deceased,
Plaintiff,

vs.

HAROLD M. KALAHAR and PHILIP
RODGERS,
Defendants.

ANSWER TO AMENDED COMPLAINT

Come now the defendants, and for answer to plaintiff's amended complaint, deny each and every allegation, matter and thing contained therein, and the whole thereof.

Wherefore, defendants having fully answered plaintiff's complaint, demand that plaintiff take nothing thereby and that judgment be given for the defendants and for their costs and disbursements incurred herein.

CAKE, JAUREGUY & TOOZE,
Attorneys for Defendants.

State of Oregon,
County of Multnomah—ss.

I, Herbert C. Hardy, being first duly sworn, depose and say: That I am one of the attorneys for the defendants in the above-entitled case; that I make this affidavit for the reason that defendants are not now within the County of Multnomah, State of Oregon; that I have read the foregoing answer, know the contents thereof, and the same is true, as I verily believe.

/s/ HERBERT C. HARDY.

Subscribed and sworn to before me this 28th day of June, 1949.

[Seal] /s/ HAROLD B. HUTCHINSON,
Notary Public for Oregon.

My commission expires 8-12-50.

Due and legal service of the within Answers, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, this 29th day of June, 1949.

/s/ W. A. FRANKLIN,
Of Attorneys for Plaintiff.

[Endorsed]: Filed June 29, 1949; Circuit Court, Oregon.

In the Circuit Court of the State of Oregon
for the County of Multnomah

No. 182-988

ROBERT CARL GETLIN, Administrator of the
Estate of Corinne Constance Getlin, Deceased,
Plaintiff,

vs.

HAROLD M. KALAHAR and PHILIP
RODGERS,

Defendants.

AMENDED COMPLAINT

Now comes plaintiff and brings this, his Amended Complaint, and for cause of action against defendants, alleges:

I.

That at all times mentioned herein, defendant Harold M. Kalahar was employed by the National Literary League, Inc., an Ohio corporation, to travel about the country as an independent contractor and solicit magazine subscriptions on behalf of said National Literary League, Inc.

II.

That in connection with his said employment said defendant Harold M. Kalahar did travel about from state to state, and town to town, soliciting magazine subscriptions, and did hire certain salesmen to solicit magazine subscriptions on behalf of himself and National Literary League, Inc.; that defendant Harold M. Kalahar paid said solicitors on a com-

mission basis, and in connection with said employment, defendant Harold M. Kalahar did furnish free transportation to said solicitors from state to state, and city to city, and said transportation was part of the compensation paid solicitors for their services; that in addition to the commissions and transportation, said defendant Harold M. Kalahar did furnish a driver to transport said solicitors from place to place.

III.

That at all times herein mentioned Corinne Constance Getlin was employed by defendant Harold M. Kalahar as a solicitor, and was provided transportation from place to place in a vehicle owned by defendant Harold M. Kalahar, and was compensated on a commission basis for her services.

IV.

That on or about August 31, 1947, Corinne Constance Getlin was being transported from Pendleton, Oregon, to The Dalles, Oregon, in a 1946 model Chevrolet station wagon owned by defendant Harold M. Kalahar, and operated by defendant Philip Rodgers, agent of said defendant Harold M. Kalahar; that said transportation was pursuant to Corinne Constance Getlin's contract of employment with defendant Harold M. Kalahar; that approximately 2:15 p.m. on said date, defendant Philip Rodgers was driving said automobile in a westerly direction on U. S. Highway No. 730; that near Mile Post 175, near Boardman, Oregon, said de-

fendant Philip Rogers so negligently and carelessly operated said vehicle that he caused the same to come into violent collision with a vehicle then and there being driven in an easterly direction by one James Ernest Tyler, causing personal injuries to said Corinne Constance Getlin, proximately causing her death on said day.

V.

That defendants, and each of them, were careless, reckless and negligent in the operation of the station wagon of the defendant Harold M. Kalahar, in the following particulars:

1. In driving said vehicle at a dangerous and reckless speed under the circumstances then and there existing;
2. In failing and neglecting to maintain a proper or any lookout for curves in said Highway, or for other vehicles then and there using said Highway;
3. In failing and neglecting to keep said vehicle under proper control so as to then and there be able to stop, swerve or otherwise avoid striking the said vehicle owned and operated by said James Ernest Tyler;
4. In driving and operating said automobile across and onto the wrong or southerly one-half of said Highway;
5. In engaged in racing with another automobile owned and operated by defendant Harold M. Kalahar at the said time and place.

VI.

That as a direct and proximate result of the careless, reckless and negligent operation of said vehicle, as aforesaid, said Corinne Constance Getlin was thrown from said automobile and killed.

That plaintiff is the husband of said deceased, and that deceased left no surviving dependents.

VII.

That heretofore and by virtue of certain proceedings had in the Circuit Court of the State of Oregon, for Multnomah County, Probate Department, plaintiff was appointed administrator of the estate of said deceased, and Letters of Administration have been issued.

VIII.

That by reason of the wrongful death of said Corinne Constance Getlin, plaintiff necessarily incurred burial expenses in the sum of \$729.28.

That said Corinne Constance Getlin was a sales girl by occupation, and earned upwards of \$200.00 per month, and was of the age of seventeen years; that she was industrious and of good health and habits, and had she survived the plaintiff would have derived pecuniary benefits from the deceased to the extent of not less than ~~Ten Thousand Dollars~~ (10,000.00), \$9,270.72, and that by reason of the death of said Corinne Constance Getlin plaintiff has been and is damaged in the sum of Ten Thousand Dollars (\$10,000.00); that plaintiff maintains this action for the benefit of himself as widower of said deceased.

Wherefore, plaintiff demands judgment against defendants and each of them for the sum of Ten Thousand Dollars (\$10,000) and for his costs and disbursements incurred herein.

LORD, ANDERSON &
FRANKLIN,

By /s/ W. A. FRANKLIN,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah—ss.

I, W. A. Franklin, being first duly sworn, on oath say that I am one of the attorneys for the above-named plaintiff; I know the contents of the foregoing Amended Complaint and believe the same to be true. I make this verification for the reason that plaintiff is not at this time within Multnomah County.

/s/ W. A. FRANKLIN.

Subscribed and sworn to before me this 17th day of June, 1949.

[Seal] /s/ MARIE BENNETT,
Notary Public for Oregon.

My commission expires 1/31/53.

Service by copy admitted this 20th day of June, 1949.

/s/ HERBERT C. HARDY,
Of Attorneys for Defendants.

[Endorsed]: Filed June 20, 1949; Circuit Court, Oregon.

In the Circuit Court of the State of Oregon
for the County of Multnomah

No. 182988

ROBERT CARL GETLIN, Administrator of the
Estate of Corinne Constance Getlin, Deceased,
Plaintiff,

vs.

HAROLD M. KALAHAR and PHILIP ROGERS,
Defendants.

COMPLAINT

Comes Now the plaintiff and for cause of action
against the defendants herein, complains and alleges
as follows:

I.

That at all times mentioned herein, defendant,
Harold M. Kalahar, was employed by the National
Literary League, Inc., an Ohio Corporation, to
travel about the country as an independent con-
tractor and solicit magazine subscriptions on behalf
of said National Literary League, Inc.

II.

That in connection with his said employment de-
fendant, Harold M. Kalahar, did travel about from
state to state, and from town to town, soliciting
magazine subscriptions, and did hire certain sales-
men to solicit magazine subscriptions on behalf of
himself and National Literary League, Inc. That
defendant, Harold M. Kalahar, paid said solicitors
on a commission basis and in connection with said

employment, defendant, Harold M. Kalahar, did furnish free transportation to said solicitors from state to state, and city to city, and said transportation was part of the compensation paid solicitors for their services; that in addition to the commissions and transportation said defendant, Harold M. Kalahar, did furnish a driver to transport said solicitors from place to place.

III.

That at all times herein mentioned, plaintiff was employed by defendant, Harold M. Kalahar, as a solicitor and was provided transportation from place to place in a vehicle owned by defendant, Harold M. Kalahar, and was compensated on a commission basis for her services.

IV.

That on or about August 31, 1947, plaintiff was being transported from Pendleton, Oregon, to The Dalles, Oregon, in a 1946 model Chevrolet station wagon, owned by defendant, Harold M. Kalahar, and operated by defendant, Philip Rodgers, agent of defendant, Harold M. Kalahar; that said transportation was pursuant to plaintiff's contract of employment with Harold M. Kalahar; that at approximately 2:15 p.m., on said date, defendant, Philip Rodgers, was driving said automobile in a westerly direction on U. S. Highway No. 730; that near Mile Post No. 175, near Boardman, Oregon, said defendant, Philip Rodgers, so negligently and

carelessly operated said vehicle that he caused the same to come into violent collision with a vehicle then and there being driven in an easterly direction by one James Ernest Tyler, causing personal injuries to plaintiff, as hereinafter alleged.

V.

That defendatnts, and each of them, were careless, reckless and negligent in the operation of the defendant, Harold M. Kalahar's station wagon, in the following particulars:

1. In driving said vehicle at a dangerous and reckless speed under the circumstances then and there existing.

2. In failing and neglecting to maintain a proper, or any lookout for curves in said highway, or for other vehicles then and there using said highway.

VI.

That as a direct and proximate result of the careless, reckless and negligent operation of said vehicle, as aforesaid, Corinne Constance Getlin was thrown from said automobile and killed.

That plaintiff is the husband of said deceased and that deceased left no surviving dependents.

VII.

That heretofore, and by virtue of certain proceedings had in the Circuit Court of the State of Oregon, for Multnomah County, Probate Department, plaintiff was appointed administrator of the Estate of said deceased and Letters of Administration have been issued.

VIII.

That said Corinne Constance Getlin was a sales girl by occupation and earned upwards of \$200.00 per month and was of the age of seventeen years; that she was industrious and of good habits and in good health and had she survived, would have accumulated an estate in excess of \$10,000.00, and that by reason of the death of said Corinne Constance Getlin plaintiff has been and is damaged in the sum of Ten Thousand Dollars (\$10,000.00); that plaintiff maintains this action for the benefit of the estate of deceased.

Wherefore, plaintiff demands judgment against defendants, and each of them, for the sum of Ten Thousand Dollars (\$10,000.00), and for his costs and disbursements incurred herein.

LORD, ANDERSON AND
FRANKLIN,

By /s/ W. A. FRANKLIN,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah—ss.

I, W. A. Franklin, being first duly sworn, say that I am one of the attorneys for plaintiff in the within-entitled action and that the foregoing Complaint is true as I verily believe; that I make this verification for the reason that plaintiff is not now within Multnomah County.

/s/ W. A. FRANKLIN.

Subscribed and sworn to before me this 14th day of June, 1947.

[Seal] /s/ WM. P. LORD,

Notary Public for Oregon.

My commission expires 2/4/1949.

State of Oregon,

County of Multnomah—ss.

No.1834

I Al. L. Brown, County Clerk and Ex-Officio Clerk of the Circuit Court of the State of Oregon for the County of Multnomah, a Court of Record, Do Hereby Certify that the foregoing copy of Complaint, Amended Complaint, Answer to Amended Complaint, Verdict and Judgment Order, case No. 182-988, Robert Carl Getlin vs. Harold M. Kalahar and Philip Rodgers, has been compared by me with the original and that it is a correct transcript therefrom, and of the whole of such original Complaint, Amended Complaint, Answer, Verdict & Judgment as the same appears on file and of record in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 20th day of October, A.D., 1950.

[Seal] AL. L. BROWN,
County Clerk.

By /s/ C. BROOKS,
Deputy.

[Endorsed]: Filed June 16, 1948, Circuit Court, Oregon.

[Endorsed]: Filed January 8, 1951; U.S.D.C.

EXHIBIT C

May 26, 1949.

Mr. Harold M. Kalahar

Re: Mason, Cannon, Smith, Nickerson and
Getlin v. Kalahar and Rodgers (five
cases)

Dear Mr. Kalahar:

In connection with the above-entitled cases, it would appear from the allegations in the amended complaints that plaintiffs are expecting to base their recovery upon the existence of an employer-employee relationship between you and the plaintiffs. We have investigated this relationship and we now have arrived at the conclusion that there probably was an employer-employee relationship between you and the plaintiffs.

We direct your attention to the following provisions of your policy:

“Exclusions

This policy does not apply:

(d) Under coverages A and C [A—bodily injury liability, and C—medical payments], to bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured, or under Coverage A, while engaged in the operation, maintenance or repair of the automobile;

(e) Under Coverage A, to any obligation for which the insured or any company as his

insurer may be held liable under any workmen's compensation law;"

(Bracketed material added)

We invite your attention to the fact that under Clause (e) of the Exclusions set forth above, there is excluded from coverage obligations for which you may be held liable under any workmen's compensation law.

It is now time that an answer be filed. If we are to undertake the defense of these cases under the provisions of our policy, our attorneys, in preparing the answers, will be obliged to admit the allegations of the complaints setting forth the employer-employee relationships between the plaintiffs and yourself, unless, of course, you have further information which is contrary to the facts as they now appear.

It also appears that since the employer-employee relationship exists, the plaintiffs' remedies probably lie under the workmen's compensation acts of the states in which they were hired and our attorneys will undoubtedly assert such defense. If this defense prevails, it is our opinion that these present cases will be dismissed in Oregon and the plaintiffs may seek their remedies under the workmen's compensation laws of other states. Of course it may be that in some of the cases the plaintiff would have no remedy under the workmen's compensation law of the state in which he was hired and if there was no such remedy, then that particular plaintiff's present suit would be construed to be a common law action of an employee against an employer. On

EXHIBIT C

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Re: Mason, Cannon, Smith, Nickerson and
Getlin v. Kalahar and Rodgers (five
cases)

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We direct your attention to the following provisions of your policy:

“Exclusions

This policy does not apply:

(d) Under coverages A and C [A—bodily injury liability, and C—medical payments], to bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured, or under Coverage A, while engaged in the operation, maintenance or repair of the automobile;

(e) Under Coverage A, to any obligation for which the insured or any company as his

insurer may be held liable under any workmen's compensation law;"

(Bracketed material added)

We invite your attention to the fact that under Clause (e) of the Exclusions set forth above, there is excluded from coverage obligations for which you may be held liable under any workmen's compensation law.

It is now time that an answer be filed. If we are to undertake the defense of these cases under the provisions of our policy, our attorneys, in preparing the answers, will be obliged to admit the allegations of the complaints setting forth the employer-employee relationships between the plaintiffs and yourself, unless, of course, you have further information which is contrary to the facts as they now appear.

It also appears that since the employer-employee relationship exists, the plaintiffs' remedies probably lie under the workmen's compensation acts of the states in which they were hired and our attorneys will undoubtedly assert such defense. If this defense prevails, it is our opinion that these present cases will be dismissed in Oregon and the plaintiffs may seek their remedies under the workmen's compensation laws of other states. Of course it may be that in some of the cases the plaintiff would have no remedy under the workmen's compensation law of the state in which he was hired and if there was no such remedy, then that particular plaintiff's present suit would be construed to be a common law action of an employee against an employer. On

the other hand, they can amend their present complaints and proceed in this state on some other theory of liability, but, of course, we cannot prophesy what they will do.

In the event that the Oregon court should decide that there was an employer-employee relationship between you and the plaintiffs, then we would not consider any judgment rendered against you as being covered by your policy, and, of course, we would refuse to pay such judgment.

In the light of possible developments in the defense of these cases, we wish to advise you as follows:

1. If we are to defend these cases, our attorneys will, unless circumstances not now foreseen indicate the desirability of some other course, interpose the defense that the plaintiffs' remedies are confined to the workmen's compensation laws of the states where they were hired because of the employer-employee relationship between them and yourself.

2. Because our policy excludes coverage when the party injured is your employee, there will be a very definite conflict of interest between the position of this company and yourself. Therefore, we are advising you at this time that you have a right to engage your own attorney to protect your interests. If you desire to engage your own attorney, our attorneys will be instructed fully to cooperate with your attorney and will furnish to him all facts and data which he may desire and which we have in our possession. Your own attorney will,

of course, advise you as to the course you should pursue. However, our attorneys will cooperate with him in every respect.

3. It should be clearly understood that whether you retain independent counsel or not, any defense furnished to you by this Company is furnished with the understanding that this Company fully reserves its right to refuse to pay any judgment that may be rendered against you. The Company does not waive such rights by proceeding with the defense of these cases.

4. We wish to remind you of the fact that all of these claims in the aggregate are in excess of your policy, which fact was pointed out to you in our letter of September 16, 1948.

We are sending two copies of this letter to you at each of the various addresses which we have had from you from time to time, since our recent attempts to contact you have proved unsuccessful. Therefore, upon receipt of the set of letters which reaches you first, please acknowledge receipt thereof by signing one of the copies and return it to us.

We finally urge you to make your decision in the immediate future respecting the defense of this case and advise us as soon as possible.

Very truly yours,

MARYLAND CASUALTY
COMPANY,

By J. P. STAPLETON.

JPS:blw

EXHIBIT D

May 26, 1949

Mr. Phillip Rodgers

Re: Mason, Cannon, Smith, Nickerson and
Getlin v. Kalahar and Rodgers (five
cases)

Dear Mr. Rodgers:

In connection with the above-entitled cases, it would appear from the allegations in the amended complaints that plaintiffs are expecting to base their recovery upon the existence of an employer-employee relationship between the plaintiffs and Mr. Kalahar. We have investigated this relationship and we now have arrived at the conclusion that there probably was an employer-employee relationship between the plaintiffs and Mr. Kalahar. We have also arrived at the conclusion that you were an employee of Mr. Kalahar at the time of the accident and within the course of your employment at that time of the accident.

We direct your attention to the following provisions of the policy of insurance carried by Mr. Kalahar at the time of the accident and covering the station wagon which you were then operating:

“Insuring Agreements

The insurance with respect to any person or organization other than the named insured does not apply:

(d) To any employee with respect to injury to or death of another employee of the

same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.”

It is now time that an answer be filed. If we are to undertake the defense of these cases under the provisions of Mr. Kalahar's policy, our attorneys, in preparing the answer, will be obligated to admit the allegations of the complaint setting forth the employer-employee relationships between the plaintiffs and Mr. Kalahar and of the agency relationship between you and Mr. Kalahar, unless, of course, we receive further information which is contrary to the facts as they now appear.

It also appears that since the employer-employee relationship exists, the plaintiffs' remedies probably lie under the workmen's compensation acts of the states in which they were hired and our attorneys will undoubtedly assert such a defense. If this defense prevails, it is our opinion that these present cases will be dismissed in Oregon and the plaintiffs may seek their remedies under the workmen's compensation laws of other states. Of course it may be that in some of the cases the plaintiff would have no remedy under the workmen's compensation law of the state in which he was hired and if there was no such remedy then that particular plaintiff's present suit would be construed to be a common law action of an employee against an employer. On the other hand, they can amend their present complaints and proceed in this state

on some other theory of liability, but, of course, we cannot prophesy what they will do.

In the event that the Oregon court should decide that there was an employer-employee relationship between plaintiffs and Mr. Kalahar and that plaintiffs were co-employees of you with Mr. Kalahar, then we would not consider any judgement rendered against you as being covered by the policy, because of the foregoing quoted portions of the policy, and, of course, we would refuse to pay such judgment.

In the light of possible developments in the defense of these cases, we wish to advise you as follows:

1. If we are to defend these cases, our attorneys will, unless circumstances not now foreseen indicate the desirability of some other course, interpose the defense that the plaintiffs' remedies are confined to the workmen's compensation laws of the states where they were hired because of the employer-employee relationship between them and Mr. Kalahar.

2. Because our policy excludes coverage when the party injured is a co-employee and the injury occurred in the course of employment, there will be a very definite conflict of interest between the position of this Company and yourself. Therefore, we are advising you at this time that you have a right to engage your own attorney to protect your interests. If you desire to engage your own attorney, our attorneys will be instructed fully to cooperate with your attorney and will furnish to him all facts

and data which he may desire and which we have in our possession. Your own attorney will, of course, advise you as to the course you should pursue. However, our attorneys will cooperate with him in every respect.

3. It should be clearly understood that whether you retain independent counsel or not, any defense furnished to you by this Company is furnished with the understanding that this Company fully reserves its right to refuse to pay any judgment that may be rendered against you. The Company does not waive such rights by proceeding with the defense of these cases.

We are sending two copies of this letter to you; please acknowledge its receipt by signing one of the copies and returning it to us.

We finally urge you to make your decision in the immediate future respecting the defense of these cases and advise us as soon as possible.

Very truly yours,

MARYLAND CASUALTY
COMPANY,

By J. P. STAPLETON.

JPS:blw

[Title of District Court and Cause.]

FINDINGS OF FACT

The above-entitled cause came before me on the 18th day of December, 1951, plaintiff appearing by Wesley Franklin, of Lord, Anderson & Franklin, and defendant appearing by Herbert C. Hardy, of Cake, Jaureguy & Tooze. The cause was tried without a jury, and after argument, briefs were submitted, the facts having been set forth in the pre-trial order. The facts upon which the judgment of the court is based are as follows:

1. Defendant was at all times herein pertinent, and now is a corporation organized under the laws of the State of Maryland, and is authorized and licensed to do business in Oregon and Texas, and as a part of its business to issue policies of automobile liability insurance in favor of owners of automobiles.

2. The plaintiff is the duly appointed, qualified and acting administrator of the Estate of Corinne Constance Getlin, deceased, by virtue of proceedings in the Circuit Court of the State of Oregon, County of Multnomah, Probate Department, and is a citizen of the State of Oregon.

3. At all times mentioned herein, one Harold M. Kalahar, hereinafter referred to as Kalahar, was the owner of a 1946 Chevrolet station wagon.

4. At all times herein pertinent, there was in full force and effect a certain automobile public

liability policy issued by the defendant herein to Kalahar and covering the above-described 1946 Chevrolet station wagon. This policy contained an exclusion section which provided that the policy did not apply:

“(d) Under coverages A and X, [A—bodily injury liability, and X—medical payments], to bodily injury to or death to any employee of the insured while engaged in the employment, other than domestic, of the insured, * * *

“(e) Under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen’s compensation law;”

(Bracketed material added by way of explanation.)

5. Defendant’s Exhibit A, comprised of a photostatic copy of the basic liability form of automobile policy of the Maryland Casualty Company of Baltimore, a photostatic copy of the home office copy of the specifications regarding the policy limits, the description of the assured and his vehicle, and a photostatic copy of the rider (form 158) attached to said automobile policy, constitute the policy of liability insurance issued by defendant to Kalahar, and is the policy on which plaintiff relies in this action.

6. On August 31, 1947, the decedent, together with Rodgers and several other magazine soliciting employees of Kalahar, were being transported in said 1946 Chevrolet station wagon from Spokane,

Washington, where they had been soliciting magazine subscriptions, to Portland, Oregon, where they were to do like soliciting. Said transportation was pursuant to their respective contracts of employment with Kalahar.

7. While decedent was thus en route from Spokane to Portland in said 1946 Chevrolet station wagon with several other employees of Kalahar, an accident occurred between the 1946 Chevrolet station wagon then being driven by Philip Rodgers, and another vehicle. As a result of that accident, the decedent was killed.

8. On June 16, 1948, the present plaintiff commenced an action against Kalahar and Philip Rodgers by the filing of a complaint for damages for the wrongful death of the decedent, Corinne Constance Getlin, in the Circuit Court of the State of Oregon, for the County of Multnomah, said case being numbered 182-988. An amended complaint was filed in said action on June 20, 1948, which changed no allegations pertinent to the present case.

9. In said complaint the plaintiff alleged that Kalahar did hire certain salesmen, paid them on a commission basis and in connection with said employment did furnish free transportation to said solicitors from state to state and city to city, said transportation being a part of the compensation paid solicitors for their services; that Corinne Constance Getlin was so employed and that at the time of the accident and her death, was being trans-

ported in Kalahar's car driven by Rodgers, pursuant to her contract of employment with Kalahar; that Kalahar and Rodgers were guilty of negligence which caused decedent's death, wherefore plaintiff demanded \$10,000 in damages. This Court finds the facts thus alleged in said complaint to be the true facts.

10. The defendant herein, Maryland Casualty Company, after the filing of said complaint, advised Kalahar in writing that the complaint was based on an employer-employee relationship between Kalahar and the decedent and that it would not pay any judgment against Kalahar based on such a relationship because of the provisions of the Exclusion section of said policy which provided that the policy did not apply

“(d) under coverages A and X, to bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured, * * *”

The defendant herein further advised the said Kalahar that any defense furnished by it in said action would be under a full reservation of right to refuse to pay any judgment, and that it did not waive any of its rights by proceeding with the defense of such case. The present defendant further advised Kalahar that he had a right to engage his own attorney to defend said action, but Kalahar did not do so.

11. Thereafter, this defendant did cause its attorneys, Cake, Jaureguy & Tooze and Herbert C.

Hardy, to interpose an answer in said case in the Circuit Court of the State of Oregon for the County of Multnomah, which answer denied all of the allegations of the plaintiff's complaint therein.

12. Defendant's Exhibit B, comprised of photo-static copies of the complaint, amended complaint, answer to amended complaint, verdict and judgment order, all of which have been certified by the County Clerk of Multnomah County, were the pleadings used and the verdict and judgment order rendered in the case of Getlin vs. Kalahar and Rodgers brought by the plaintiff herein in the Circuit Court of the State of Oregon for the County of Multnomah, case No. 182-988.

13. On February 6, 1950, said case came on for trial in said court before the Honorable Charles W. Redding and was tried by a jury. After both parties had rested in said case, the trial judge instructed the jury on the issues of the case, defendant's Exhibit E being a certified copy of all of the instructions to the jury given in that case, said trial judge specifically instructing the jury in part as follows:

"I instruct you that before you can bring in any verdict in this case against the individual defendant Harold M. Kalahar you must also find that the defendant Philip Rodgers was an employee of the defendant Kalahar and also that the decedent, Corinne Constance Getlin, was also an employee of the defendant Kalahar as I shall later define that relationship to you.

“You are instructed that in determining whether or not the decedent, Corinne Constance Getlin, and the defendant Philip Rodgers were employees of the defendant Harold M. Kalahar, the test as to the existence of the relationship is whether there is an understanding between the parties that one is to render personal services to or for the benefit of the other and recognition by them of the right of Harold M. Kalahar to order and control the other in the performance of the work and to direct the manner and method of its performance.”

14. Thereafter the jury did take said case under consideration and did render its verdict in favor of the plaintiff and against the defendant Kalahar and the defendant Rodgers, and each of them, and adjudged the plaintiff's damages in the sum of Five Thousand Dollars (\$5,000). Based upon said verdict, the Honorable Charles W. Redding did on the 21st day of February, 1950, enter a judgment in favor of the present plaintiff against the said Harold M. Kalahar and Philip Rodgers, and each of them, in the sum of Five Thousand Dollars (\$5,000), together with plaintiff's costs and disbursements in the amount of One Hundred Fifty-three Dollars Sixty Cents (\$153.60), which judgment was entered in the journal on February 21, 1950, and docketed on February 23, 1950, in Book 46, page 127, and is the judgment upon which the plaintiff bases this present action.

15. The defendant herein has refused to pay to the plaintiff said judgment, or any part thereof.

16. The parties have stipulated that defendant's policy does not cover the defendant Rodgers, and that regardless of the outcome of this lawsuit, no judgment can be rendered in this case against the defendant Maryland Casualty Company based solely upon the judgment against Philip Rodgers.

Conclusions of Law

Based on the foregoing findings of fact, the court's conclusions of law are as follows:

I.

The action brought by the plaintiff herein in the Circuit Court of the State of Oregon, for the County of Multnomah, against Kalahar, the defendant's insured, and Rodgers, the driver of Kalahar's car, determined that the decedent was an employee of the insured and that at the time of the fatal accident she was engaged in the employment of Kalahar within the meaning of the policy, and the issue is now *res judicata*.

II.

Even if the Circuit Court action in Oregon is not determinative of decedent's status at the time of the accident on the basis of the above findings of fact, the decedent was, at the time of the fatal accident, an employee engaged in the employment of the insured within the meaning of the exclusionary clause contained in the automobile public liability policy issued by the defendant to Kalahar.

III.

The insured's (Kalahar's) liability to plaintiff is not covered by the automobile public liability policy issued by the defendant to Kalahar, since the policy expressly excludes liability for "bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured * * *."

IV.

Defendant is not liable under the automobile public liability policy issued by it to the insured for the liability imposed upon insured by the verdict and judgment rendered in the case of Getlin, et al., vs. Kalahar and Rodgers, in the Circuit Court of the State of Oregon, for the County of Multnomah, case No. 183-988.

V.

A final judgment should be entered in favor of the defendant and against the plaintiff.

Dated this 18th day of June, 1951.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed June 18, 1951.

In the District Court of the United States
for the District of Oregon

Civil No. 5776

ROBERT CARL GETLIN, Administrator of the
Estate of Corinne Constance Getlin, Deceased,

Plaintiff,

vs.

MARYLAND CASUALTY COMPANY, a Cor-
poration,

Defendant.

JUDGMENT

Now, therefore, based upon said Findings of Fact
and Conclusions of Law,

It Is Hereby Ordered and Adjudged that defend-
ant have judgment against the plaintiff and that the
plaintiff take nothing from the defendant herein.

Dated this 18th day of June, 1951.

/s/ GUS J. SOLOMON,

United States District Judge.

[Endorsed]: Filed June 18, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the plaintiff, Robert Carl Getlin, administrator of the estate of Corinne Constance Getlin, deceased, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this case on the 18th day of June, 1951, and from the whole thereof.

Dated this 12 day of July, 1951.

ANDERSON & FRANKLIN,

By /s/ W. A. FRANKLIN,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 12, 1951.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Know All Men by These Presents, that we, Robert Carl Getlin, administrator of the estate of Corinne Constance Getlin, deceased, appellant, as Principal, and Kathryn Engele, as Surety, are held and firmly bound unto Maryland Casualty Company, a corporation, defendant, in the full sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said Maryland Casualty Company, a corporation,

defendant, or its assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29 day of June, in the Year of Our Lord One Thousand Nine Hundred Fifty-one.

Whereas, on June 18, 1951, in the District Court of the United States for the District of Oregon, in an action depending between the said Robert Carl Getlin, administrator of the estate of Corinne Constance Getlin, deceased, plaintiff, and said Maryland Casualty Company, a corporation, defendant, a judgment was rendered against the said appellant and the said appellant having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid action on appeal to United States Court of Appeals for the Ninth Circuit, at San Francisco, California,

Now, the condition of the above obligation is such that if the said appeal is dismissed, or the judgment affirmed or modified, the said Robert Carl Getlin, administrator of the estate of Corinne Constance Getlin, deceased, Appellant, and Kathryn Engele, Surety, do hereby jointly and severally undertake and promise on the part of the appellant that said appellant will pay all damages, costs and disbursements which may be awarded against appellant on appeal.

[Seal] /s/ ROBERT C. GETLIN,

[Seal] /s/ KATHRYN ENGELE.

United States of America,
District of Oregon—ss.

Kathryn Engele, whose name is subscribed to the within undertaking as surety, being duly sworn, deposes and says that she is a free-holder within said District, and is worth the sum of Five Hundred Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

/s/ KATHRYN ENGELE.

Subscribed and sworn to before me this 29th day of June, 1951.

[Seal] /s/ WESLEY A. FRANKLIN,
Notary Public for Oregon.

My Commission expires 12/22/52.

[Endorsed]: Filed July 12, 1951.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer, pre-trial order, findings of fact and conclusions of law, judgment, notice of appeal, undertaking on appeal, statement of points, designation of contents of record, and transcript of docket entries, constitute the record on appeal from a judg-

ment of said court in a cause therein numbered Civil 5776, in which Robert Carl Getlin, administrator of the estate of Corinne Constance Getlin, deceased, is plaintiff and appellant, and the Maryland Casualty Company, a corporation, is defendant, and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 3rd day of August, 1951.

LOWELL MUNDORFF,
Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 13046. United States Court of Appeals for the Ninth Circuit. Robert Carl Getlin, Administrator of the Estate of Corinne Constance Getlin, Deceased, Appellant, vs. Maryland Casualty Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed August 6, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13046

ROBERT CARL GETLIN, Administrator of the
Estate of CORINNE CONSTANCE GETLIN,
Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY, a Corpo-
ration,

Appellee.

STATEMENT OF THE POINTS ON WHICH
APPELLANT INTENDS TO RELY

Pursuant to Rule 19(6) of the Rules of this Court, the appellant presents the following statement of the points upon which he intends to rely on this appeal:

1. The trial court erred in concluding that the action brought by appellant in the Circuit Court of the State of Oregon for the County of Multnomah against Harold M. Kalahar, appellee's insured, determined that the decedent was an employee of Kalahar and "engaged in the employment of the insured" at the time of the fatal accident, within the meaning of the policy and that the issue is res judicata.

2. The trial court erred in concluding that decedent at the time of the fatal accident was an

employee "engaged in the employment" of appellee's insured, Kalahar, within the meaning of the exclusive clause contained in the automobile public liability policy, issued to Kalahar by the appellee.

3. The trial court erred in concluding that the liability of the insured (Kalahar) to appellant was not covered by the automobile public liability policy issued by appellee to Kalahar.

4. The Findings of Fact do not support the trial court's Conclusions of Law and Judgment.

ANDERSON & FRANKLIN,

By /s/ W. A. FRANKLIN,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 10, 1951.

[Title of District Court and Cause.]

DESIGNATION OF THE CONTENTS OF
RECORD ON APPEAL

Robert Carl Getlin, administrator of the estate of Corinne Constance Getlin, deceased, the above-named appellant, hereby designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal:

The complete record and all the proceedings and evidence in the said action which shall include:

Complaint.

Answer.

Pre-trial order, together with all exhibits attached thereto.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Designation of the matter to be included in the record.

Undertaking on appeal, costs.

Statement of Points upon which appellant intends to rely.

Stipulation for hearing at San Francisco.

ANDERSON & FRANKLIN,

By /s/ W. A. FRANKLIN,

Attorneys for

Plaintiff-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 10, 1951.



United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT CARL GETLIN, Administrator of the
Estate of CORINNE CONSTANCE GETLIN,
Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY, a Cor-
poration,

Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the
District of Oregon.

ANDERSON & FRANKLIN, and
W. A. FRANKLIN,
317 S. W. Alder Street,
Portland, Oregon,

Attorneys for Appellant.

CAKE, JAUREGUY & TOOZE,
HERBERT C. HARDY,
1220 Equitable Building,
Portland, Oregon,

Attorneys for Appellee.

FILED

OCT 24 1951

PAUL P. O'BRIEN
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United States
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ROBERT CARL GETLIN, Administrator of the
Estate of CORINNE CONSTANCE GETLIN,
Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY, a Cor-
poration,

Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the
District of Oregon.

**STATEMENT OF PLEADINGS AND FACTS OF
JURISDICTION**

This is a cause on appeal from the United States District Court for the District of Oregon. It is an action in which plaintiff seeks to recover the sum of \$5,053.60, together with interest thereon from appellee. Appellant recovered judgment in the Circuit Court of the State of

Oregon for the County of Multnomah against appellee's insured (Tr. 32). Appellee refused to pay the judgment, and appellant brought the present action in the United States District Court for the District of Oregon to effect collection.

The appellant is a citizen of the State of Oregon and appellee is a citizen of the State of Maryland (Tr. 6, 54); the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000 (Tr. 6).

The action was filed in the United States District Court for the District of Oregon pursuant to 28 U.S.C.A. Sec. 1332 (Tr. 6).

This court has appellate jurisdiction to review this cause by virtue of 28 U.S.C.A. Section 1291.

The documents showing the existence of jurisdiction are the complaint (Tr. 3), Answer (Tr. 7), Pre-trial Order (Tr. 14), and Findings of Fact and Conclusions of Law (Tr. 54).

STATEMENT OF THE CASE

This cause arises out of an automobile accident in which appellant's decedent was fatally injured on October 31, 1947. Decedent was employed by one Harold M. Kalahar as a magazine salesman. The employer furnished transportation from city to city and the accident occurred near Boardman, Oregon, while the vehicle was being driven by one Phillip Rodgers, a co-employee.

Appellant brought an action pursuant to the Oregon wrongful death statute against both Kalahar and Rodgers in the Circuit Court of the State of Oregon for the County of Multnomah. This case resulted in a verdict and judgment against both defendants in the sum of \$5,000, together with costs in the sum of \$153.60.

Defendant Kalahar carried a policy of indemnity insurance with appellee, Maryland Casualty Company. Appellee refused to pay the judgment rendered in the State Court case and appellant filed the present action in the United States District Court for the District of Oregon to effect collection. When the cause came on for pre-trial it was stipulated that appellee's policy did not cover a judgment rendered against the defendant Phillip Rodgers (Tr. 20). There was no dispute between the respective parties as to the facts involved, and the matter was submitted to the Court on a stipulated statement of facts (Tr. 14). The only issue submitted to the Court for its determination was whether or not at the time of the death of decedent she was "engaged in the employment of the insured Kalahar within the meaning of the policy" (Tr. 20). The trial court found that decedent was so engaged at the time of her death. It further found that this issue was res judicata because of the judgment rendered in the cause in the Circuit Court of the State of Oregon for the County of Multnomah (Tr. 60).

Final judgment in favor of appellee was entered June 18, 1951 (Tr. 62), and from this judgment appellant now appeals.

SPECIFICATIONS OF ERROR

I.

The trial court erred in concluding that the action brought by appellant in the Circuit Court of the State of Oregon for the County of Multnomah against Rodgers and Kalahar determined that the decedent was "engaged in the employment of the assured" at the time of the fatal accident within the meaning of the policy, and that the issue was *res judicata* (Conclusions of Law I, Tr. 60), upon the ground and for the reason that there was no issue upon this point in the State Court case.

II.

The trial court erred in concluding that at the time of the fatal accident decedent was an employee "engaged in the employment of the insured" Kalahar within the meaning of the exclusionary clause (Conclusions of Law II, Tr. 60), contained in Kalahar's liability policy, for the reason that an employee is never "engaged" in the employment within the meaning of such an exclusionary clause unless the employee is actively performing some duty on behalf of the employer.

III.

The trial court erred in concluding that the liability of the insured Kalahar to appellant was not covered by an automobile public liability policy issued by appellee to Kalahar (Conclusions of Law III, Tr. 61), for the reason that the exclusionary clause did not apply to plaintiff's decedent under the factual situation presented to the court.

IV.

The Findings of Fact do not support the trial court's Conclusions of Law and Judgment for the reason that under the facts as stipulated it was contrary to law for the court to conclude that the issue of whether or not decedent was "engaged in the employment" of the assured was res judicata, or to conclude that in any event decedent was so "engaged."

SUMMARY OF ARGUMENT

Appellant's contentions are as follows:

I.

The trial court erred in concluding that the issue of whether or not appellant's decedent was engaged in the employment was res judicata for the reason (a) there was no issue concerning whether or not the decedent was so engaged in the State Court trial, and (b) no such finding was necessary to support the State Court judgment.

II.

Appellant earnestly contends that under practically all the reported cases, and particularly under the decisions of the State of Oregon, it is contrary to law for the Court to conclude that decedent was "engaged in the employment" of the insured, Kalahar, at the time of the fatal accident.

III.

The trial court was in error in concluding that the liability of the insured Kalahar to appellant was not

covered by appellee's liability policy, since the exclusionary clause (Tr. 61) could not apply to the decedent under the factual situation as decedent was not actually engaged in performing any duty for her employer.

IV.

Appellant is entitled to judgment in accordance with the prayer of his complaint (Tr. 6).

FIRST SPECIFICATION OF ERROR

The trial court erred in concluding that the action brought by appellant in the Circuit Court of the State of Oregon for the County of Multnomah against Rodgers and Kalahar determined that the decedent was "engaged in the employment of the assured" at the time of the fatal accident within the meaning of the policy, and that the issue was *res judicata* (Conclusions of Law No. I, Tr. 60), upon the ground and for the reason that there was no issue upon this point in the State Court case.

ARGUMENT

In the State Court case appellant alleged that at all times mentioned decedent was "employed by defendant Harold M. Kalahar" (Tr. 37). Appellant further alleged that defendant Kalahar furnished a driver to transport decedent and her co-employees from place to place (Tr. 37). To these allegations the defendant Kalahar filed a general denial (Tr. 34), denying each

and every allegation, and thus the relationship of decedent to the defendant Kalahar became an issue.

The State Court judge, in instructing the jury, instructed as follows:

“I instruct you that before you can bring in any verdict in this case against the individual defendant Harold M. Kalahar you must also find that the defendant Philip Rodgers was an employee of the defendant Kalahar and also that the decedent, Corinne Constance Getlin, was also an employee of the defendant Kalahar as I shall later define that relationship to you.

“You are instructed that in determining whether or not the decedent, Corinne Constance Getlin, and the defendant Philip Rodgers were employees of the defendant Harold M. Kalahar, the test as to the existence of the relationship is whether there is an understanding between the parties that one is to render personal services to or for the benefit of the other and recognition by them of the right of Harold M. Kalahar to order and control the other in the performance of the work and to direct the manner and method of its performance.” (Tr. 19)

It is perfectly obvious from reading the foregoing instruction that the issue the instruction was meant to cover was whether or not the decedent and Rodgers were “employees” at the time of the accident. The obvious reason for the allegation in the complaint to the effect that they were employees was to obviate the necessity of proving gross negligence under the Oregon guest statute. Appellee, in its trial brief, contended that decedent’s status at the time of her death was a very material issue in the State Court trial. With this contention, of course the appellant agreed and now agrees.

Appellant contended that "the relationship" of decedent to Kalahar at the time of her death was controlling. Appellee argued that whether she met the test of an "employee" the day before, or the week before her death, was immaterial.

Of course the appellant does not deny appellee's contentions in this regard. Indeed appellant alleged in the original action (Tr. 37) that decedent was an "employee." Appellant earnestly contends that there is nothing in the pleadings in the State Court action, or in the Court's instructions, which would even remotely touch the question at issue here, namely: Was decedent "engaged in the employment of the insured" Kalahar at the time of her death within the meaning of the policy (Tr. 20)?

Appellee has contended in the District Court that the legal theory upon which Kalahar's liability was predicated in the State Court of necessity encompassed the determination of the employer-employee relationship. Appellee contended that the mere relationship of employer-employee is not sufficient to hold an employer under the theory of respondeat superior, but that in addition it must be shown that *the employee* was engaged within the scope of his employment.

Of course at this point it becomes material to re-examine the facts and determine which employee appellee was and is referring to. In the State Court action of course appellant was attempting to hold defendant Kalahar responsible because of the negligent acts of his agent, Rodgers. In regard to Rodgers, we quote from the instructions, as follows:

“With respect to the defendant Kalahar, you are instructed that the defendant Kalahar would be liable to plaintiff in damages for the negligent acts, if any, of the defendant Rodgers only if you find from a preponderance of the evidence that the defendant Rodgers was at the time of the accident driving the car in which the decedent was riding by authority of and at the express direction of the defendant Kalahar. That is to say, Kalahar would be liable for Rodgers’ negligent acts, if any, only if Rodgers was at the time serving as relief driver pursuant to a prior request so to serve made by the defendant Kalahar, and provided further that if employed by Kalahar the decedent, pursuant to the terms and conditions of her employment, was *not permitted to participate in or direct the operation of or exercise control over the operation of the car in which she at the time was riding.*” (Italics ours) (Appellee’s Exhibit E, Tr. 23)

Rodgers was driving the car at the time of the fatal accident. The court required the jury to find that he was so driving “by authority of and at the express direction of defendant Kalahar.” The court further required the jury to find that decedent “WAS NOT PERMITTED TO PARTICIPATE IN OR DIRECT THE OPERATION OF OR EXERCISE CONTROL OVER THE OPERATION OF THE CAR IN WHICH SHE WAS AT THE TIME RIDING.”

It will thus be seen that the judge in the State Court action made a careful distinction between the status of the deceased employee and the employee Rodgers, although instructing the jury that before they could return a verdict for the plaintiff they must find that “both were employees.”

Upon such a state of the record it is difficult for the appellant to conceive how the appellee can even seriously contend that the issue presented in the District Court case is *res judicata*. Appellee, of course, concedes that insofar as the defendant Rodgers is concerned, he was "engaged in the employment" of the insured at the time of the accident. Indeed, under the court's instructions the jury was required to so find. However, insofar as the deceased employee is concerned, the exact converse is true. With regard to her, the jury was required to find that she was not only a passive rider in the vehicle, but to go even further and find that she was not permitted to participate in, or direct the operation of, or exercise control over the operation of the car.

Let us now turn to an examination of some of the cases and authorities on the question of *res judicata*.

50 C.J.S., Sec. 598, states the rule of *res judicata* to be as follows: That before the rule can be invoked there must be identity of parties, of subject matter and of issues.

As to identity of issues, 50 C.J.S., Sec. 830, states the rule.

"Generally, a plea of *res judicata* must allege the identity of issues, cause of action and subject matter in the former suit and that the current suit ought to be barred as the result of the prior judgment."

In fact, the general rule seems to be that a plea of *res judicata* which does not allege identity of issues is demurrable. See *Rigg v. Canterbury*, 116 W. Va. 303.

180 S.E. 182; also *Day v. Weadock*, 114 Fla. 251, 140 S. 668, where it was held that a plea of *res judicata* is insufficient where it does not show actual judgment on issues sought to be adjudicated.

A reading of the cases will indicate that the courts have been uniformly strict in interpretation of this rule, and that the benefit of an alleged former adjudication cannot be pleaded informally or in general terms or as a mere conclusion of the pleader, but to avail a party in later litigation he must show by his pleadings in the form of quotations or exhibits the complaint and exact character of pleadings in former suits, so that the court, not the pleader, may say *with complete certainty that the issues in the former suit and the later one are precisely the same and that the exact issues sought to be determined in the later case have in fact been decided in the prior one*. See *City of Moundsville v. Brown*, 127 W. Va. 602, 34 S.E. 2d 321.

The rule as set forth in *Corpus Juris* and in the cases cited above is also the rule in Oregon. In *Taylor v. Taylor*, 54 Or. 560, at 574, after announcing the general rule of *res judicata*, the court stated:

"This distinction should also be kept in mind in considering the effect of a former judgment or decree; if the second action or defense is upon the same claim or demand, the former judgment is a bar not only as to matters actually determined, but such as could have been litigated, but if it is upon another claim or demand the former judgment is not a bar *except as to questions actually determined or directly in issue*." (Italics ours)

In this same case the court quotes with approval from *Caperton v. Schmidt*, 26 Cal. 479:

“It will be seen from the rule above stated that the matter adjudicated to become as a plea a bar or as evidence conclusive must have been *directly* in issue *and not merely collaterally litigated*. It must be a fact immediately found according to the pleadings—not that on which the verdict was merely based—a *fact in issue as distinct from a fact in controversy*.” (Italics ours)

It is manifest that as the rule is thus set forth it could not possibly be applied to the factual situation presented here. In the State Court action there was no direct issue as to whether or not decedent was “engaged in the employment.” Neither was this question collaterally litigated, nor was it indeed a fact in controversy. Before the jury could find for plaintiff it was required to find in accordance with plaintiff’s complaint that deceased was an employee, and was further required to find that deceased held merely a passive position in the vehicle and was not permitted to participate in, or direct the operation of, or exercise control over the operation of the car.

Under the instructions of the State Court judge, as set forth above, it appears that the jury must have of necessity determined that deceased occupied merely a passive position in the vehicle. If the rule of *res judicata* can be applied to the present case at all, it would appear that a much stronger argument could be made in favor of the proposition that the issue of whether or not deceased was “engaged in the employment” has been decided to the effect that she was not.

The books are full of cases to indicate that *res judicata* does not apply unless the particular question was directly in issue, or of necessity could have been litigated in the prior suit. Thus in *Ex parte Landry*, 142 P. 2d 432, a judgment in a prior abandonment proceeding instituted by minor's paternal aunt and uncle against mother was conclusive only of question of abandonment, and was not *res judicata* on habeas corpus of mother to secure custody of son from aunt and uncle where the question of abandonment was not in issue.

In *Johnson v. Whalen*, 186 Okla. 511, 98 P. 2d 1103, it was held that a judgment in favor of plaintiffs to enjoin obstruction by defendant of driveway between the realty of the parties extending only up to front end of garage was not *res judicata* of action by defendant in former suit for ouster and to quiet title of strip of land occupied by garage.

This case is an excellent case on this problem, as it goes into the various decisions on the matter and quite clearly sets forth the necessary elements.

A fairly recent Oregon case on the subject is *Watson v. Pacific Mutual Life Insurance Co. of California*, 144 Or. 413, 21 P. 2d 201, 25 P. 2d 162. This was an action on an accident and health policy, wherein it was determined that the insurer waived monthly proofs of continued disability. The insurer contended that this was determinative of its further liability on the question of permanent disability. The court stated:

"At most the question of permanent incapacity or permanent disability was only a fact in controversy, and not a fact in issue."

It thus appears clear that Oregon adopts the rule that even though a fact is in controversy it does not become res judicata unless actually a fact directly in issue.

In the case of *Southern Oregon Co. v. United States*, 241 F. 16, it was held a suit by the United States to enforce a covenant in a land grant was not barred by the judgments in prior suits relating to certain other lands claimed under the grant, but in which the questions involved in the later suit were not presented or decided.

It would be useless to prolong this brief unduly with numerous citations supporting the foregoing rule. For a few other cases supporting the proposition that res judicata does not apply unless the exact question was directly in issue in the prior action, see *Schumacher v. Industrial Accident Commission*, 46 C.A. 2d 95, 115 P. 2d 571; *Jenkins v. Thomas*, 119 Or. 292, 247 P. 145; *Miner v. Zweifel*, 118 Or. 182, 245 P. 729; *Stark v. Coker*, 20 Cal. 2d 839, 129 P. 2d 390.

We submit that the question involved in the District Court case was not in issue or even in controversy in the State Court action. Neither was a finding that the decedent was "engaged in the employment" necessary to support the verdict in the State Court action. Under this state of the record, we earnestly contend that the trial judge erred in concluding that this issue was res judicata.

SECOND SPECIFICATION OF ERROR

The trial court erred in concluding that at the time of the fatal accident decedent was an employee "engaged in the employment of the insured" Kalahar within the meaning of the exclusionary clause (Conclusion of Law II, Tr. 60), contained in Kalahar's liability policy, for the reason that an employee is never "engaged" in the employment within the meaning of such an exclusionary clause unless the employee is actively performing some duty on behalf of the employer.

ARGUMENT

By the Pre-trial Order (Tr. 20), respective parties stipulated that the only issue to be determined was whether or not decedent was "engaged in the employment of the insured" within the meaning of the policy. Since the appellee set this up as an affirmative defense, it is elementary that the burden of proof in this respect was upon appellee.

There are many cases from many jurisdictions dealing with the relative rights of employees injured while being transported to and from work. The majority of these cases have arisen under situations where the injured party was making a claim under the various Workmen's Compensation Acts.

In most of such cases the statutes (like Section 102-1752, O.C.L.A.) provide compensation for injuries "arising out of and within the course of" employment. Notes

20 A.L.R. 319; 49 A.L.R. 454; 63 A.L.R. 469; 100 A.L.R. 1053; 82 A.L.R. 1043. Obviously questions concerning the compensability of injuries under such statutes can shed little light upon the question of whether these employees were "engaged in the employment of the insured" within the meaning of the exclusion.

It is well settled that Workmen's Compensation Laws receive a liberal interpretation to accomplish their humane purposes, among which is to extend the benefits to as many persons as possible. *Brady v. Oregon Lbr. Co.*, 117 Or. 188; *Bowser v. State Ind. Accident Commission*, 182 Or. 42; *Bundy v. State of Vermont Highway Dept.*, 102 Vt. 84, 146 A. 68. Likewise the Oregon Employers' Liability Act is remedial and receives a liberal interpretation. *Blair v. Western Cedar Co.*, 75 Or. 276; *Dickerson v. Eastern & Western Lbr. Co.*, 79 Or. 281. So that the benefits of the latter statute have been extended to persons who were not in the proximate relation of master and servant with the defendant. *Clayton v. Enterprise Electric Co.*, 82 Or. 149; *Cauldwell v. Bingham & Shelley Co.*, 84 Or. 257; *Rorvik v. North Pacific Lbr. Co.*, 99 Or. 58; *McKay v. Pacific Bldg. Materials Co.*, 156 Or. 578.

Appellee seeks to have the rule of liberal interpretation of remedial statutes applied indirectly to its own benefit. The law, however, is otherwise. Since appellee prepared the contract in its own technical language, the contract will be construed strictly against it and liberally in favor of the insured. *Fenton v. Fidelity Casualty Co.*, 36 Or. 283; *Stringham v. Mutual Ins. Co.*, 44 Or.

447; *A. Jaloff v. United Auto Indemnity Exch.*, 120 Or. 381; *Purcell v. Wash. F. N. Ins. Co.*, 141 Or. 98. All ambiguous provisions must be construed in favor of coverage for the insured and against forfeiture. *Moore v. Aetna Life Ins. Co.*, 75 Or. 47; *Purcell v. Wash. F. N. Ins. Co.*, supra; *Bankers Life Co. v. Hollister* (Ore. 9th Cir.), 33 F. 2d 72.

The question here is not whether insured was liable as an employer, under the Employers' Liability Act, or otherwise, nor whether the benefits of a liberally construed Workmen's Compensation Law would have been extended to these employees. The precise question presented here is whether this employee was "engaged in the employment of the insured" within the meaning of a contract which must be construed strictly against the insurer.

This question has recently had the attention of the courts. In *Francis v. Scheper*, 326 Mich. 447, 40 N.W. 2d 217, judgment was obtained by the injured workman against the insured and the insurer was brought in as garnishee. The insurance company relied upon a clause which excluded coverage for injury or death of any "employee of the insured while engaged in the employment other than domestic of the insured." Thus the key words of the exclusion are exactly the same as in the case at bar. The facts were that the injured employee was employed by defendant as a painter. His hours were from 8:00 A.M. to 4:30 P.M. His pay was computed only within those periods but his employment agreement required the insured to furnish him

transportation to and from work. The employee was not, however, required to use the transportation furnished. The accident occurred at 4:40 or 4:45 P.M. when the employee was performing no service, but was simply riding home in the employer's truck. The trial court found that the employee "was not engaged in Houck's (the insured's) employment at the time of the accident." Garnishee insurance company appealed and contended there, as here, that holdings that such an injury would have been compensable under the Workmen's Compensation Act were controlling. The court rejected this contention saying (40 N.W. 2d 214, 217):

"In the Konopka case, *supra*, we were considering the meaning of the words of the workmen's compensation act. In the instant case, we must consider the meaning of the exclusion clause in the policy of insurance and determine whether the words, '*engaged in the employment.*' are applicable to an employee who has ceased the day's production and left the scene of his work and the hours were over for the work for which he was compensated.

"The phrase, 'engaged in the employment,' can fairly be construed as meaning, *active in the work plaintiff was employed and paid to do.* It was incumbent on defendant casualty company, who drafted the policy, in order to escape liability under the circumstances of this case, so to draft the policy as to make clear the extent of non-liability under the exclusion clause." (Italics ours)

Another decision upon quite similar facts is *B. & H. Passmore Co. v. New Amsterdam Casualty Co.* (3d Cir.), 147 F. 2d 536. The facts in that case were similar to the case at bar. Defendant insurance company re-

lied upon an exclusion relating to injuries sustained by "any employee of the insured while engaged in the business of the insured." The court held as a matter of law that the case was not within the exclusion, saying (147 F. 2d 536, 538, 539):

"At the time of the accident Little was not engaged in any work and was not performing any service for Passmore and he was not receiving any pay for his time. He was simply riding from the place of work to Passmore's shop in a conveyance gratuitously furnished by Passmore. The Casualty Company relies upon decisions of the Oklahoma Supreme Court holding that an injury to an employee sustained while he is returning from work in a conveyance furnished by his employer is an injury 'arising out of and in the course of his employment.' But, in those decisions the Supreme Court was construing a provision of the Oklahoma Workmen's Compensation Law and not a private contract, and it has repeatedly held that such law is a remedial statute and should receive a liberal construction in favor of the injured employee.

* * * *

"Moreover the exclusion clause 'engaged in the business, * * * of the insured' differs materially from the clause 'arising out of and in the course of his employment.' The word 'engaged' connotes action. In *Barnett v. Merchants' Life Ins. Co.*, supra (87 Okl. 42, 208 P. 272), the court, in construing a clause in the policy 'shall engage in military or naval service in time of war,' held that the word 'engage' denotes action and that it means to take part in by performing some duty.

"In *Head v. New York Life Ins. Co.*, 10th Cir., 43 F. 2d 517, 520, this court said: "'Engage,' is defined in volume 3 of *Words and Phrases*, Third Series, at page 258, as follows: "'Engage' means to take part in or be employed in, however the em-

ployment may arise;" and at page 259 as follows: "To 'engage' is to embark in a business; to take a part; to employ or involve one's self; to devote attention and effort." ' ' "

In *Elliott v. Behner*, 150 Kan. 876, 96 P. 2d 852, on facts similar to the case at bar and involving an exclusion clause identical with that involved in the *Passmore* case, the Supreme Court of Kansas held the insurer liable and rejected the legal argument of the insurer which was based upon a Workmen's Compensation Act using the phrase "arising out of and in the course of employment." *Green v. Travelers Ins. Co.*, 286 N.Y. 358, 36 N.E. 2d 620, and *State Farm Auto Ins. Co. v. Skluzacek*, 208 Minn. 443, 294 N.W. 413, involved exclusions similar to the one involved in the *Passmore* case and similar facts. In both cases it was held that the exclusion did not apply.

For a case in which reasoning similar to the above cited cases was applied to somewhat different facts and in which cases involving Workmen's Compensation Laws were held not applicable between the insured and his liability insurer see *Lesser v. Great Lakes Casualty Co.*, 171 Or. 174.

Additional cases holding that the word "engage" connotes action in performing some duty, devoting attention and effort, are: *Benham v. American Central Life Ins. Co.*, 140 Ark. 612, 217 S.W. 462; *Barnett v. Merchants Life Ins. Co.*, 87 Okla. 42, 208 P. 271; *Head v. New York Life Ins. Co.*, 43 F. 2d 517; *Travelers Indemnity Co. v. Smith*, 190 Ark. 492, 79 S.W. 2d 1008; *The Alexander*, 60 F. 914; *Hobbs v. Penn. R. Co.*, 143

F. 180, 181; *Kelley v. Northwest Paper Co.*, 190 Minn. 291, 251 N.W. 274.

For a Washington case involving similar reasoning to the cases cited above see *Braley Motor Co. v. Northwest Casualty Co.*, 49 P. 2d 911. In this case the court points out (page 913) that in construing the language of an insurance policy it is a familiar rule that the construction will be adopted which is most favorable to the insured. The Court will find this same rule in practically all of the cases hereinbefore cited.

In all of the cases which we have cited the Court will see that there is a great distinction between "arising out of and within the course of the employment," and "engaged in the employment." Furthermore, there is a distinction in the cases as to whether a statute is being construed, particularly a remedial statute such as a workmen's compensation act, or whether it is an insurance contract being construed. The statutes are liberally construed in favor of compensation to the employee, while on the other hand, an insurance contract is strictly construed against the insurer and in favor of the insured.

We wish to call the Court's particular attention to the case of *Lamm v. Silver Falls Timber Co.*, 133 Or. 468, 277 P. 91, 286 P. 527, 291 P. 375, 62 A.L.R. 1447. In this case plaintiff was being gratuitously transported over defendant's logging railroad from Silverton, Oregon, to defendant's logging camp. The plaintiff had gone to Silverton for a few days and at the time of the injury was returning to camp where he intended to re-

sume work the following day. Plaintiff secured a judgment and defendant appealed, contending that the case was within the purview of the Oregon Workmen's Compensation Law. The judgment was affirmed and the court stated:

"To bring a case within the protection of the Workmen's Compensation Act, the employee must show, as he was required to establish under the common law that he was, at the time of the injury, engaged in the employer's business, or in furthering that business, and that he was not doing something for his own benefit or accommodation."

The defendant petitioned for a rehearing. On rehearing the judgment was reversed. In a very exhaustive opinion by Justice Rossman, it was pointed out that the foregoing quoted statement was not a true statement of the law as applied to a Workmen's Compensation case. Justice Rossman stated (page 489):

"It is true that when he was injured he was not *working for* the defendant, *but he was in its employ*. (Page 490) To say that plaintiff 'ceased' working for the defendant is not equivalent to saying that he severed the relation of employer and employee." (Italics ours)

At page 491 the court quotes with approval from an English case as follows:

"It has been established by a series of decisions that employment for the purposes of the Workmen's Compensation Act may in many cases be regarded as existing before the actual operation of the workman has begun, and that it may continue to exist after the actual work has ceased."

The court points out the work may suspend and yet the employment continue. At page 492 the court quotes with approval from a Wisconsin case, as follows:

“This court has held that the relation of master and servant extends beyond the hours a servant is actually required to labor and in some instances to places other than where the servant is employed.”

We shall not attempt to cite all the cases on which the court relied in the *Silver Falls* case, as there are literally dozens of them, and most of them are to be found in the A.L.R. citations. However, it is quite apparent from the decisions that the Oregon Supreme Court is committed to the proposition that there is a vast distinction between the words “arising out of and within the course of the employment,” and the words “engaged in the employment.”

In the *Lamm v. Silver Falls* case, after it was reversed on rehearing, the plaintiff filed a petition for rehearing, and it came on for decision the third time. The Supreme Court, in another decision by Justice Rossman, adhered to the previous decision and held that the plaintiff could not sue his employer but could only recover compensation under the compensation act, and again pointed out that the injury arose out of the employment although the plaintiff was not “engaged in the employment” at the time of the injury.

In his petition for rehearing the plaintiff had contended that the court’s decision was contrary to the decisions in some cases decided according to the common law rule prior to the enactment of the workmen’s

compensation law. The court disposed of this contention in the following language:

“We do not believe that it is essential that we should endeavor to harmonize our holding in the present case with the first three. The Workmen’s Compensation Act endeavors to cast upon the industry the expense of the rehabilitation and relief of workmen injured during their participation in it. Its objective is more comprehensive than the principles which govern the common law action of negligence. * * * (p. 530).”

Plaintiff in *Lamm v. Silver Falls* relied upon the decision of the Washington Supreme Court in *Hama Hama Logging Co. v. Department of Labor and Industries*, 288 P. 655. The facts of the Washington case were substantially the same as those in the *Lamm* case. The Supreme Court of Washington held that under the circumstances the injured party was not entitled to compensation but could maintain an action for damages against his employer. The Oregon Court pointed out that in the case of *Wadnec v. Clemons Logging Co.* (Wash.), 263 P. 592, and *Bristow v. Department of Labor and Industries*, 246 P. 573, the Washington Supreme Court had held that an employee injured at the plant *though not engaged in the course of his employment*, was entitled to compensation. However, prior to the *Hama Hama* case, the Washington compensation act was amended so that at the time of the injury in the latter case the act limited relief to a workman “who is engaged in the employment” of an employer under the act. We submit that the decision of the Oregon Supreme Court in the *Lamm v. Silver Falls* case supports the position of the appellant here.

For another analogous situation, we call the Court's attention to the case of *Associated Indemnity Corporation v. Wachsmith* (Wash.), 99 P. 2d 420.

We should like to call the Court's attention also to the case of *Rickenbacker v. Layton, et al.*, 59 F. Supp. 156. The facts in the *Rickenbacker* case are substantially the same as the facts under consideration here, and the appellee Maryland Casualty Company was the insurance carrier in that case also. There was divergent testimony as to whether or not the plaintiff, at the time of his injury, was an "employee" of the insured. The defendant was relying upon an identical exclusion which the appellee seeks to assert here. The court disposed of the defendant's contention in the following language:

"It is too well settled in South Carolina, to need the citation of authorities in support thereof, that in the construction of insurance contracts that meaning should be attributed to the language used which ordinarily is given to such language, unless it is susceptible of more than one reasonable construction, in which case it will be given that construction which is most favorable to the insured. Here the language of the policy excludes an employee of the insured from coverage only when such employee is actually engaged in the business of the insured. To say that a casual employee of the insured, who was not at the time of his injuries engaged in any business of the insured and had not been for two hours, is excluded from coverage would be to give the language of the policy a strained construction or else to resolve a possible ambiguity in favor of the insurer and against the insured. (page 163)"

In its trial brief appellee contended that the author-

ities are clear that where, as a part of the contract of employment, an employee is to be furnished transportation from one place of work to another place of work, such an employee is engaged in the employment of the employer while being thus transported.

In support of this proposition, appellee relied upon three cases. We shall point out to the Court that not a single one of these cases supports any such proposition.

In *Webb v. American Fire & Casualty Co.*, 149 Fla. 2, 5 S. 2d 252, the employee was engaged by the insured as a clerk under a contract and agreement by which she was to work as a clerk either in a store located at Deerfield, Florida, or another store located at Pompano, Florida, as and when her services should be required at either place, and that as compensation for her services she was to receive a stated weekly salary, was to be provided with room and board, and was to be transported to and from the store or stores where she was to work. On the day of the accident she was being transported from the store at Pompano to the store at Deerfield, from which she was to be transported to the place where she was furnished her board and room. The policy carried by the employer had an exclusionary clause in all material respects identical with the clause in issue here. There was an issue as to whether or not the injured employee was "engaged in the employment." The Florida court stated in one short paragraph that it was bound by its decisions in *Cohn v. Sloan*, 138 Fla. 752, 197 S. 14, and *Southern States Mfg. Co. v. Wright*, 200 S. 375.

An examination of the first of these two cases on which the *Webb* case is expressly predicated, indicates that in the *Cohn* case an employee was killed in an automobile accident while riding to her home town from another town where she had been taken by the employer. The *Cohn* case is a Workmen's Compensation Act case and merely holds that the accident "arose out of the employment."

In the *Southern States Mfg. Co.* case the employer furnished a truck for the convenience of plaintiff to and from the plant. He was hurt while being so conveyed. This was another Workmen's Compensation case, and the only issue was whether or not the accident "arose out of the employment." The court held that it did so arise and an award of compensation was upheld.

It thus become apparent that the Florida Supreme Court in the *Webb* case either (1) used the terms "arising out of the employment" and "engaged in the employment" as synonymous terms, or (2) the litigants made no distinction between the terms and no distinction was ever pointed out to the court.

When the *Webb* case is carefully read, and the cases on which it is expressly predicated are examined it is apparent that the case is absolutely no authority for the proposition that an employee injured while merely riding in a vehicle is "engaged in the employment of the employer."

An examination of the second case on which appellee relied in its trial brief indicates that it likewise is no authority for any such proposition. In *Gilmore v. Royal*

Indemnity Co., 24 Automobile Cases 1091 (Ohio), plaintiff was injured while being transported in insured's automobile. The insured's policy contained an exclusionary clause quite similar to the clause in question here. The court in its decision stated:

"The facts bring plaintiff within the operation of the general rule that if an employee, while being conveyed to or from work in a conveyance furnished by the employer under either express or implied contract to so convey, suffers an injury during said journey *such injury arises within the course of the employment.*" (Italics ours)

Of course, appellant has conceded throughout the State Court and District Court proceedings that the injury "arose out of the employment." *That is not the issue here.* It is readily apparent that the Ohio court used these terms as synonymous terms or that the distinction was not pointed out to the court. As we have point out *supra*, the Oregon court has made a careful distinction in these terms. In any event, the Ohio case does not hold, and it is not authority for the proposition that a workman injured while being gratuitously transported to or from work, or to different places of work in an employer's conveyance is "engaged in the employment."

The only case which the appellee cited which might be even remotely considered to support its proposition is *State Farm Mutual Automobile Ins. Co. v. Brooks*, 136 F. 2d 807. However, the facts in that case are substantially different than the facts involved here, and the decision in the case must be read in the light of the facts

there involved. The policy-holder operated a fuel yard at Joplin, Mo. As a part of his business he secured wood from points outside of Joplin. The policy-holder hired two boys, who accepted temporary employment at the place where the wood was obtained to collect it and pile it for loading and transportation in the truck covered by the policy to insured's fuel yard at Joplin. Sometimes when the truck arrived from its last trip of the day at Joplin the two boys would help to unload it. It was understood between the employees and the policy-holder that they would be carried to and from the place where they collected and piled the wood to Joplin, a distance of 35 miles, as they had no other means of transportation. One boy was killed and the other seriously injured in an accident, and an action was brought for declaratory judgment by the insurance company against the policy-holder to determine its liability for the payment of a judgment on account of the accident. The policy contained an exclusion clause similar to the one in question here. The court held that the exclusion clause applied.

We think it sufficient to point out to the Court that in the *Brooks* case the injured party was required to ride a distance of 35 miles from where the wood was obtained to the point where the wood was to be unloaded, and after it arrived at the yard to unload it. The injured employee was paid by the day. The transportation to and from the collection yard and the fuel yard was an essential part of his work. He was not merely given free transportation but was actually paid for the time consumed during the ride. In addition he

had additional duties to perform after the truck arrived at the fuel yard. It would appear that there is a clear distinction between this case and the case at bar, where the decedent was paid on the commission basis and was merely riding in a conveyance gratuitously furnished by the employer.

It is always necessary to come back to the fundamental question of whether or not the injured party was performing the duties he was hired to perform at the time of the injury. We wish to call the Court's attention to a case involving a different type of insurance and a different type of exclusion clause, but which we believe is very well reasoned and presents an analogous situation. In *Barnett v. Merchants Life Ins. Co. of Des Moines, Iowa*, 208 P. 271, deceased had a policy of insurance which contained an exception to the effect that it was inapplicable if deceased died as a result of being "engaged in military service in time of war." Deceased contracted pneumonia while being transported on the high seas by the military, and the insurance company resisted payment on the ground that the decedent was "engaged in military service." It was clear that he was being transported as a Marine enlisted man, that the transportation was furnished by the military, that he had no other reasonable means of transportation, and that the pneumonia was contracted because of being transported on the high seas and while being so transported. Nevertheless, the Oklahoma Supreme Court held that the decedent was not "engaged in the military service" within the meaning of defendant's policy.

While a different type of policy was involved and a different exclusion was relied upon, we can see no fundamental distinction between the carrier in that case contending that the deceased was engaged in military service and the contention of appellee here that decedent was engaged in insured's employment.

Appellee in its trial brief also relied upon Blashfield's *Cyclopedia of Automobile Law and Practice*, Vol. 6, page 718, Section 3995. An examination of this citation indicates that Blashfield sets out the rule as follows:

"An employee is not engaged in the employer's business while riding home from work where the employer has not undertaken to furnish transportation, but where the employer has impliedly undertaken to furnish transportation, he is still an *employee* while riding from place of work." (Italics ours)

In a foot-note Blashfield cites *City of Wichita Falls v. Travelers Insurance Co.*, 137 S.W. 2d 170. In the case cited by Blashfield the City gave free transportation from the city barns to place of employment and return. Plaintiff was injured while being so transported and it was held that he was *an employee* when injured. It is thus clear (1) Blashfield does not say that where an employer has impliedly undertaken to furnish transportation the employee is engaged in the employment while riding from the place of work, but merely states that while so riding he is an "employee," which appellant has always conceded; and (2) the foot-note case merely holds that under such circumstances the workman is "an employee."

On the issue involved here it is possible to find a few cited cases which at first blush would appear to support the proposition that the worker being furnished gratuitous transportation is "engaged in the employment." However, when these cases are carefully examined it becomes quite clear that none of them expressly so holds. The great majority merely hold that where an employee is furnished free transportation and injured during the course of such transportation, the injury "arises out of the employment."

Furthermore, whatever the rule may be in some other jurisdiction, we submit that the law is well settled in the State of Oregon that under such a factual situation an employee is not "engaged in the employment."

No great citation of authorities is required on the general rule that the Federal courts are bound by the decisions of the courts of the states in which they sit on any substantive matter. See 35 C.J.S. (Federal Courts) Sec. 170, and cases cited therein. We earnestly submit that the district court is bound by the Oregon Supreme Court's decision in *Lamm v. Silver Falls Timber Co.*, supra, and *Varrelman v. Flora Logging Co.*, 133 Or. 541.

The court erred in concluding that at the time of the fatal accident decedent was "engaged in the employment of the insured" Kalahar.

THIRD SPECIFICATION OF ERROR

The trial court erred in concluding that the liability of the insured Kalahar to appellant was not covered by an automobile public liability policy issued by appellee to Kalahar (Conclusions of Law III, Tr. 61), for the reason that the exclusionary clause did not apply to plaintiff's decedent under the factual situation presented to the court.

ARGUMENT

As we have indicated in our argument directed to our First Specification of Error, the issue of whether or not decedent was "engaged in the employment" at the time of the fatal accident could not possibly be res judicata.

In the argument directed to our Second Specification of Error we have pointed out numerous cases and authorities, and in particular the Oregon cases to the effect that an employee who was being provided with gratuitous transportation and was injured during the course of such transportation, was not "engaged in the employment," since the employee is not engaged in any activity on behalf of the employer.

The appellant has recovered judgment in the State Court on account of the death of decedent. Appellee's only defense to the District Court action to effect collection of the judgment is the exclusionary clause of

the policy. Since this clause did not apply to decedent, the court erred in concluding that the liability of the insured (Kalahar) to appellant was not covered by the automobile public liability policy issued by appellee to Kalahar.

FOURTH SPECIFICATION OF ERROR

The Findings of Fact do not support the trial court's Conclusions of Law and Judgment upon the ground and for the reason that under the facts as stipulated it was contrary to law for the court to conclude that the issue of whether or not decedent was "engaged in the employment" of the assured was *res judicata*, or to conclude that in any event decedent was so "engaged."

ARGUMENT

The court's Findings of Fact of course are taken almost verbatim from the Pre-trial Order (Tr. 14). There has never been any dispute between appellant and appellee as to the essential facts.

We have endeavored to point out to the Court that under practically all of the reported cases where the facts are the same or similar, the authorities are quite uniform that an employee, injured while being gratuitously transported, is not "engaged in the employment." The cases which we have cited in this brief clearly indicate that under such a state of facts the trial court erred with reference to Conclusions of Law I, II, III and IV,

inclusive (Tr. 60, 61). It follows that the Findings of Fact do not support the Conclusions of Law.

We submit the judgment should be reversed.

Respectfully submitted,

ANDERSON & FRANKLIN,

By W. A. FRANKLIN,

Attorneys for Appellant.



United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT CARL GETLIN, Administrator of the
Estate of CORINNE CONSTANCE GETLIN,
Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY, a Cor-
poration,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the
District of Oregon.

ANDERSON & FRANKLIN, and
W. A. FRANKLIN,
317 S. W. Alder Street,
Portland, Oregon,
Attorneys for Appellant.

CAKE, JAUREGUY & TOOZE,
HERBERT C. HARDY,
1220 Equitable Building,
Portland 4, Oregon,
Attorneys for Appellee.

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PAUL P. O'BRIEN
CLERK

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United States
COURT OF APPEALS
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ROBERT CARL GETLIN, Administrator of the
Estate of CORINNE CONSTANCE GETLIN,
Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY, a Cor-
poration,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the
District of Oregon.

STATEMENT OF THE CASE BY APPELLEE

The appellant's statement of the case being acceptable to the appellee, no additions thereto are being made.

SUMMARY OF ARGUMENT

Although there are four specifications of error, there are actually only two real issues involved in the appeal, and they are raised by the first and second assignments of error, respectively.

Based upon the facts of record, the District Judge correctly determined that the issue of whether or not at the time of the accident the decedent was an employee of the insured engaged in her employment was *res judicata* by virtue of the state court action. In the state court action, the appellant, in order to avoid the effect of the Oregon guest statute, pleaded that the decedent was an employee of the insured and at the time of the accident which resulted in her death was being transported by the employer pursuant to a contract of employment. It is the appellee's contention that under this condition the question of whether or not the decedent was engaged in her employer's business at the time of the accident was an issue in the state court action, and having been decided in favor of the appellant in that action, the appellant is now estopped from denying that relationship in this action to collect on the judgment.

The appellee's second argument is that even if the appellant is not estopped by the doctrine of *res judicata*, nevertheless, upon the facts of the record, it is clear that the appellant's decedent was actually engaged in the employment of the assured at the time of her death as an employee, and that since the policy excluded coverage to employees so engaged in the employment of the assured, the appellant is not entitled to recover.

ARGUMENT

I.

The Trial Court correctly determined that the issue of whether or not at the time of the accident the decedent was an employee of the insured and engaged in her employment, was *res judicata* by virtue of the State Court action. (R. p. 60—Conclusion # 1)

As we understand appellant's position, the error is predicated on the charge that there was no issue in the state court as to whether or not the decedent was "engaged in the employment of the assured" at the time of the accident (Ap. Br. pp. 4 and 6, First Specification of Error), and therefore the doctrine of *res judicata* could not apply (Ap. Br. p. 12). The appellant also discusses the requirements of pleading *res judicata* (Ap. Br. pp. 10-11), but makes no charge that it was improperly pleaded in this case. We believe that the real issue of this specification of error can best be disposed of by first discussing the applicable law on *res judicata*, and then applying it to the factual situation of this case.

THE LAW OF RES JUDICATA

The doctrine of *res judicata* involves two main principles clearly expressed in 50 C.J.S., Sec. 592, at page 11, as follows:

"(1) The judgment or decree of a court of competent jurisdiction on the merits concludes the parties and privies to the litigation and constitutes

a bar to a new action or suit involving the same cause of action either before the same or any other tribunal, as considered *infra* § 598. (2) Any right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same, as considered *infra* §§ 686, 712. These rules afford a logical and convenient method of dividing the numerous cases falling within the principle of *res judicata*."

This dual phase of *res judicata* was long ago recognized and adopted by the Supreme Court of Oregon, in the case of *Ruckman v. Union Railway Co.*, 45 Or. 578, 78 Pac. 748; and was recently re-expressed in *Winters v. Bisailon*, 152 Or. 578, 57 P. 2d 1095. The same distinction was noted in *Cromwell v. Sac. County*, 94 U.S. 351, 24 L. Ed. 195, and this Court in *Hatchitt v. United States* (C.C.A. 9), 158 F. 2d 754, quoting from *Northern Pacific R. v. Slight*, 205 U.S. 122, 130-132, 27 S. Ct. 442, 51 L. Ed. 738, where the same matter was noted.

It is the appellee's contention that the case at bar comes under the second phase, for this is not a new action involving the same cause of action upon which the appellant sued in the state court. The latter cause of action was merged in the state court judgment, and this is a new action based on that judgment. As we read the appellant's authorities under the first assignment of error, beginning with the case of *Taylor v. Taylor*, 54 Or. 560, 103 Pac. 524 (Ap. Br. p. 11), it appears that

the appellant and ourselves concur as to the phase of the doctrine to be applied to this case.

The real and only difference between the parties on this specification of error lies in the application of the doctrine to the facts of this case.

THE STATUS OF DECEDENT AS AN ISSUE IN THE STATE COURT

Under the foregoing authorities it is clear that if the question of decedent's being engaged in the assured's employment was either "directly in issue" or "actually determined" in the state court, the doctrine will apply.

On pages 6 and 7 of his brief, appellant admits that the relationship of the decedent and Kalahar "became an issue" in the state court. He further admits that the obvious reason for the allegation in the complaint that decedent was "an employee" was to avoid proving gross negligence under the Oregon Guest Statute. But what appellant attempts to do is to convey the impression that the only issue in this respect was the existence or non-existence of an employee-employer relationship. He fails to include some allegations and the denial thereof which go clear beyond the mere existence of that relationship and show that one of the issues was whether or not, at the time of the accident the decedent was doing one of the things she was actually engaged to do, i.e., travel from one city to another, as directed by her employer at the time determined by him and by the means provided by him.

We are sure the appellant will not in his reply brief or in his argument take the position that the mere relationship of employer-employee by itself always negates a host-guest relationship. If A employs B to work five days a week, on a monthly wage, and on a Sunday A takes B fishing for their mutual pleasure, it is obvious that while on the fishing trip B occupies a position as guest so far as his rights against B are concerned, even though he is at that time an employee.

If appellant had been satisfied that the mere relationship of employer-employee was sufficient to avoid the guest statute, he could simply have alleged the relationship, the negligence of the employer, and the death, but this he did not do. First, he alleged the hiring of various salesmen and the furnishing of their transportation as a part of their compensation. Then, in paragraph III of the complaint (R. p. 37), he alleged the hiring of decedent and the provision for her transportation. Finally, in paragraph IV (R. p. 37) he specifically and with care alleged that *at the time and place of the accident decedent's "transportation was pursuant to Corinne Constance Getlin's contract of employment with defendant Harold M. Kalahar."*

The issue was joined on each of these allegations by the denial thereof (Defendant's answer, R. p. 34), and therefore we submit that the same were "directly in issue" and thus come within that class of issues covered by the second phase of the *res judicata* rule that a "former judgment is not a bar except as to questions actually determined or directly in issue". *Ruckman v. Union Railway Co.*, 45 Or. 578 at 781, 78 Pac. 748 at 750.

Appellant apparently contends that the phrase "engaged in the employment" is a phrase of art, and that since said words were not used in his complaint, there could have been no such issue (Ap. Br. p. 12). Without allegations which would remove plaintiff from a guest status or a mere employee status, the plaintiff could not have prevailed without proof of gross negligence, which was not alleged. We submit that the allegations of appellant's complaint in the state court action referred to above were intended to, and did, set up the issue that at the time of her death decedent was doing one of the things she was employed to do, i.e., travel from place to place as directed, "pursuant to her contract of employment", which is in essence the same as an allegation that she "was engaged in the employment" of the defendant.

It was the relationship of the decedent and the employer at the time of the accident that was the material issue, as appellant admits at the bottom of page 7 of his brief. In determining that relationship at that time, the jury were instructed to determine whether the decedent was to render personal service to or for the benefit of Kalahar with a right in him to order and control the decedent in that work. The instruction was as follows:

"I instruct you that before you can bring in any verdict in this case against the individual defendant Harold M. Kalahar you must also find that the defendant Philip Rodgers was an employee of the defendant Kalahar and also that the decedent, Corinne Constance Getlin, was also an employee of the defendant Kalahar as I shall later define that relationship to you.

“You are instructed that in determining whether or not the decedent, Corinne Constance Getlin, and the defendant Philip Rodgers were employees of the defendant Harold M. Kalahar, the test as to the existence of the relationship is whether there is an understanding between the parties that one is to render personal services to or for the benefit of the other and recognition by them of the right of Harold M. Kalahar to order and control the other in the performance of the work and to direct the manner and method of its performance.”

Now appellant urges that at the time of the accident the relationship was in a dormant state and that decedent was on her own and not doing anything for the employer. Under his theory, the decedent would never have been engaged in her employer's business except for that fleeting moment when she was asking the housewife to subscribe to the *Woman's Home Companion*, for as the door is shut she ceases to “solicit”.

The appellant had his day in court; he recovered a judgment based on the allegation and proof that the decedent was at the time of her death performing a part of her job by riding from one city to another “pursuant to her contract of employment”. He should not now be permitted to deny the existence of the determination of the issue which permitted his recovery.

A few comments are required concerning certain other points under appellant's first assignment of error.

On pages 8 and 9 of his brief, appellant refers to certain alleged contentions of the appellee in the District Court and discusses the same. No such contention is here made by appellee, and therefore we shall not discuss the same.

On pages 10 and 11 of appellant's brief, authorities are cited as to the manner of pleading *res judicata*. The record herein contains everything necessary for this Court to determine what issues were before the state court, and since appellant has not charged the District Court with error as to how the issue of *res judicata* was raised, we shall refrain from further comment.

The authorities cited by appellant under this specification of error not being in conflict with the general rules set forth above at pages 3-4, we shall not take the space to discuss them.

We submit that Conclusion of Law No. I of the District Court (R. p. 60) was without error and amply justified on the record.

II.

Decedent was engaged in the employment of the insured, Kalahar, within the meaning of the policy at the time of the accident resulting in her death.

Under the second specification of error, on page 17 of his brief, appellant states as follows:

"The question here is not whether insured was liable as an employer, under the Employers' Liability Act, or otherwise, nor whether the benefits of a liberally construed Workmen's Compensation Law would have been extended to these employees. The precise question presented here is whether this employee was 'engaged in the employment of the insured' within the meaning of a contract which must be construed strictly against the insurer."

We are in accord that the precise question in appellant's second assignment of error is limited to determining whether or not the decedent was "engaged in the employment of the insured" within the meaning of the policy and that the coverage afforded by Workmen's Compensation Laws and Employers' Liability Acts and cases discussing the same have no bearing on this case. Contrary to appellant's statement on page 16 of his brief, appellee is not interested in having the liberal rules of those statutes applied to this case, for it is wholly unnecessary. This case is to be decided on common law principles, and there are adequate clear authorities in that field. Accordingly, we shall not discuss any of the multiple authorities cited by the appellant in those statutory fields, except the one Oregon case of *Lamm v. Silver Falls Timber Company*, 133 Or. 468, 277 Pac. 91, 286 Pac. 527, 291 Pac. 375.

Before proceeding with the authorities, we again wish to remind the Court of the unusual factual situation respecting the employment of the decedent and her fellow employees. In examining the authorities on this question, we believe that the following factual points of this case must constantly be borne in mind:

1. The decedent and her fellow employees were hired by Kalahar in Iowa and Nebraska "for the purpose of soliciting magazine subscriptions in various towns from state to state throughout the entire Western United States" (R. p. 15).

2. At the time of the accident, decedent and her co-employees were being transported "from "Spokane,

Washington, where they had been soliciting magazine subscriptions, to Portland, where they were to do like soliciting" (R. p. 16).

3. The transportation of the decedent and the other employees "was pursuant to their respective contracts of employment with Kalahar" (R. pp. 16-17).

4. Contrary to the statement of the appellant in his brief, at the top of page 30, that the decedent "was merely riding in a conveyance gratuitously furnished by the employer", the conveyance was furnished pursuant to the decedent's contract of employment (R. p. 17).

It is apparent from the foregoing facts and from appellant's admission as to decedent's employee status, that what we are actually here concerned with is the determination of the status of an employee during the course of transportation, which transportation is furnished pursuant to an agreement between the employer and the employee, which transportation is an integral part of the employment contract and which employment contract by its very nature required the employee to move from city to city and state to state in the transportation thus accorded, and at the times required by the employer. On the other hand, we are not here concerned with cases determining whether or not the particular decedent was or was not an employee, nor are we here concerned with cases in which the transportation was purely a gratuity offered the decedent, which she might or might not use as it suited her fancy.

We shall now proceed to discuss the various authorities and in so doing are dividing the cases into categories into which they logically fall.

A. *The authorities are clear that where, as a part of the contract of employment, the employee is to be furnished transportation from one place of work to another place of work that such an employee is engaged in the employment of the employer while being thus transported.*

Lamm v. Silver Falls Timber Co., 133 Or. 468, 277 Pac. 91, 286 Pac. 527, 291 Pac. 375;

Webb v. The American Fire & Casualty Company, (Fla., 1941), 5 So. 2d 252 (1942);

Gilmore v. The Royal Indemnity Company, et al., Ohio Court of Appeals, 1st Appellate Dist., Hamilton County (1946), reported in 24 Automobile Cases 1091;

State Farm Mutual Automobile Insurance Co. v. Brooks (C.C.A. 8th, 1943), 136 F. 2d 807; certiorari denied, 320 U.S. 768, 88 L. Ed. 459.

Before discussing cases involving insurance policies, we believe it will be helpful to review the common law on the question of the liability of a master to a servant for injuries received while being transported by the master. Appellant has placed great reliance on *Lamm v. Silver Falls Timber Co.*, 133 Or. 468, 277 Pac. 91, 286 Pac. 527, 291 Pac. 375, which was a case involving the Oregon Workmen's Compensation Act (See App. Br., p. 21 et seq.). In the third and final opinion of that case, the Court, in setting forth the common law rule on such transportation, quoted and commented upon Labatt, Master and Servant (2d Ed.), § 155, as follows

at page 525 of the Oregon Report, and page 375 of Vol. 291 Pac.:

" . . . Since the plaintiff sustained his injury while riding upon a railway car, operated by defendant, we shall consider only the sub-division of the above common law rule which the courts applied in similar instances.

"From Labatt's Master and Servant (2d Ed.), § 155, we quote:

" 'A servant who, at the time of the accident in suit, was being transported on a railway car or other vehicle furnished for the purpose of facilitating the performance of his work, is deemed to have been injured in the course of his employment, and therefore can not recover if the injury was the result of risk known to and appreciated by him. . . . The inability of such employees to recover has been affirmed, both where the accident occurred while they were journeying between two points at which work was to be done, and where it occurred while they were being transported from the place where they resided to the place where they worked.'

"In the succeeding language Mr. Labatt points out that the law regarded the employees as under the control of his master in the above situations; the mere fact that the latter permitted the servant to sit inert, and did not demand the performance of active duty during the transportation was not deemed a negation of the right. Likewise the common law regarded the conveyance as an instrument which facilitated the performance of the work in hand like any tool or piece of machinery employed in the achievement of the desired result. But, according to Mr. Labatt, when the 'injured person was traveling entirely for his own purposes, and the right of the master to exact the performance of services was not merely dormant, but wholly suspended,' the defense of common employment was not available because under such circumstances the

employee was not engaged in the course of his employment."

We submit that the foregoing adequately answers the appellant's contention that an employee is engaged in employment only when actively engaged with his hands. In the present case it is obvious from the nature of the employment that it was essential to the employer that his employees travel in the vehicle provided, from and to the designated cities and states, at the times determined by him; otherwise his crew would not have kept together. Under such circumstances, the conveyance should be considered "as an instrument which facilitated the performance of the work in hand like any tool or machinery". *Lamm v. Silver Falls Timber Co.*, supra.

It will be apparent to the Court after reading the authorities cited by the appellant and those hereinafter discussed that the largest number of cases are involved with transportation of employees from their home to their place of employment or from the place of employment to their homes. In some of these cases the transportation is a part of the contract of employment; in some it is not. The instant case is not one of transportation from home to place of employment or vice versa, but is one in which the transportation from one place of work to another was an integral part of the employment. A diligent search of all of the authorities involving suits to recover under insurance policies having exclusionary clauses similar to the one in question reveals but two, and possibly three, cases involving transportation from one place of work to another place of work.

The first of these cases is that of *Webb v. The American Fire & Casualty Company* (Fla., 1941), 5 So. 2d 252. In that case the employee was engaged by the insured as a clerk under a contract and agreement by which she was to work as a clerk in either a store located at Deerfield, Florida, or another store located at Pompano, Florida, as and when her services should be required at either place, and that as compensation for her services she was to receive a stated weekly salary, was to be provided with room and board and was to be transported to and from the store or stores where she was to work. On the day of the accident, the plaintiff was being transported from the store at Pompano to the store at Deerfield, from whence she was to be transported to the place where she was furnished her board and room. The policy held by the employer in that case had an exclusionary clause almost identical with the one in this case (see R. p. 17) and which read as follows:

“This policy does not apply . . . to bodily injury or death of any employee of the Insured while engaged in the business of the Insured (other than domestic employment in the home) or in the operation . . . etc.”

The Supreme Court of Florida held that at the time of her injury the plaintiff was an employee engaged in the business of the insured.

Appellant, on page 27 of his brief, seeks to disparage the authority of this case on the grounds that the authorities mentioned by the court as being binding precedents were Workmen's Compensation cases wherein

the words involved were "arising out of the employment", which, he states, the Florida court failed to distinguish from the words of the policy "engaged in the business". Our reply is that the decision was based on specific facts and a specific policy, both like those in this case, and on those facts the court held the employee to be "engaged in the business of the assured". To say that the cases referred to by the court were not in point, or that the lawyers did not properly present the case is a feeble attempt to avoid a clear-cut decision.

The second of the three cases and the only case involving a crew of salesmen being transported under circumstances identical to those in the present case is the case of *Gilmore v. The Royal Indemnity Company, et al.*, Ohio Court of Appeals, 1st Appellate Dist., Hamilton County (1946), reported in 24 Automobile Cases 1091. In that case the defendant insurance company had insured an employer under a liability policy containing an exclusion clause reading as follows:

"(e) Under coverage A, to bodily injury to or death of *any employee of the insured while engaged in the business of the insured*, other than domestic employment, or in the operation, maintenance or repair of the automobile; or to any obligation for which the insured may be held liable under any Workmen's compensation law;" (Italics supplied)

The insured in that case sold his products in various cities by a crew of saleswomen in charge of a crew manager who operated the insured's automobile that was used to transport the crew to various cities where they worked. In response to the insured's advertisement for

sales persons, the plaintiff in the case was interviewed by the insured, and terms of employment were agreed upon on a salary and commission basis. The plaintiff was to begin work on the Monday following her employment in El Paso, Texas. Pursuant to this agreement, it was arranged for the plaintiff to accompany the sales crew in the insured's automobile on Sunday from San Antonio to El Paso, where actual work was to begin on Monday morning. No selling was contemplated on Sunday, and while the crew were enroute, in the charge of the crew manager, the accident occurred, resulting in plaintiff's injuries. Plaintiff sued the insured in Texas, alleging in her complaint that she was an employee of the insured and that by the terms of the contract of employment the insured had agreed to furnish transportation to her to the various places where plaintiff was to sell defendants' products, and that she was injured pursuant to her contract of employment. Plaintiff recovered judgment by default in that action, the judgment stating that the facts as alleged in the complaint were found to be true. The plaintiff then brought an action in Ohio against the defendant insurance company to recover under the policy. The insurance company raised the defense that there was no coverage because the employee fell within the exclusion clause above. The court, in finding for the defendant insurance company, held that the plaintiff was bound by the allegations in her Texas petition, which were incorporated into the Texas judgment and which facts brought her "squarely within exclusion E of the policy." This exclusionary clause, as shown above, was "engaged in the busi-

ness of the insured", which, except for the use of the word "business" instead of "employment" is identical with the case at bar.

Appellant ignores this express determination in seeking to avoid the effect of this case, by quoting a paragraph (Ap. Br. p. 28) wherein the court gives the general common law rule and uses the phrase "course of employment". Here again the appellant cannot avoid an exact decision on specific facts which in all relevant particulars is on all fours with the present case.

One of the leading cases on this question is that of *State Farm Mutual Automobile Insurance Co. v. Brooks* (C.C.A. 8th, 1943), 136 F. 2d 807; certiorari denied, 320 U.S. 768, 88 L. Ed. 459. We have included this case as being one involving transportation from place to place rather than from place of employment to home, with some hesitance, because from the inconsistent findings of the trial court in the case, this fact is uncertain. However, we have included it under this group because one of the appellant's authorities upon which he heavily relies, to-wit, *B. & H. Passmore Metal & Roofing Co. v. New Amsterdam Casualty Company* (10 Cir.), 147 F. 2d 536 (Ap. Br., pp. 18 and 19), in discussing the *State Farm Mutual Automobile Insurance Company v. Brooks* case (supra), stated that it was a case where employees were being transported "from one place of work to another place of work to perform additional duties at the latter place". (See 147 F. 2d 536 at 539.)

In *State Farm Mutual Automobile Insurance Company v. Brooks* (supra), the policy holder was operating

a fuel yard at Joplin, Missouri. As a part of his business, he secured wood from points outside of Joplin. The policy holder hired two boys, who accepted temporary employment "at the place where the wood was obtained, to collect it and pile it for loading and transportation in the truck covered by the policy to the assured's fuel yard at Joplin". Sometimes when the truck arrived from its last trip of the day at Joplin, the two boys would help to unload it. It was understood between the employees and the policy holder that they would be carried to and from the place where they collected and piled the wood to Joplin, as they had no other means of transportation. The action was one for a declaratory judgment by the insurance company against the policy holder to determine its liability for the payment of a judgment which had been secured against the policy holder for the death of one boy and serious injuries to the other. The policy contained an exclusion clause, reading as follows:

"This policy does not apply: . . . to bodily injury to or death of any employee of the insured while engaged in the business . . . of the insured."

In holding that the exclusionary clause applied, Justice Woodrough, speaking for the 8th Circuit Court of Appeals, stated as follows, at page 811:

"The thirty-five miles of travel by the truck between the yard at Joplin and the slab pile was also clearly within the employment of the boys in the business. The appellees have cited cases in which such transportation was not so included, as in *Green v. Travelers Insurance Company*, 286 N.Y. 358, 36 N.E. (2d) 620, where berry-pickers

employed on a piece basis were free to go to and come from the fields as they chose, but were given a ride as an accommodation. Here the boys had no other means of getting to the slab pile, as their transportation back and forth was contemplated in the contract of employment and was a necessary part of the insured's business."

The court then went on to hold that as a *matter of law* the claims asserted against the insured were not within the coverage of the policy.

In an effort to distinguish this case, appellant (Ap. Br., pp. 28-30) asserts a difference in facts, each of which we shall compare with the present case.

First: He states that the employees in that case were "required" to ride from where they worked during the day to their homes where they sometimes helped unload the wood. This is no different from the "requirement" that decent travel from city to city and state to state to perform her work as a magazine solicitor.

Second: He states that the boys in the *Brooks* case were paid by the day, while the decedent was paid a commission. We agree that the daily wage in the *Brooks* case probably took into account the time of transportation, but it is just as surely true that the rate of commission in this case must have taken into account the travel time necessary between cities and states.

Third: The transportation in the *Brooks* case is stated to have been "an essential part of the work", yet the appellant herein in his complaint (R. p. 37)

has effectively established the essentiality of the transportation in this case by alleging that the same was furnished "pursuant to the contract of employment"; and how could the entire western part of the United States have been covered without transportation being an essential element of the relationship?

Fourth: Appellant finally concludes his distinction by a statement that in this case the transportation was "gratuitously furnished". Earlier in the same paragraph, however, he stated that the injured person in the *Brooks* case was given "free transportation." We don't see any distinction, and furthermore, for an employee *not* to be "gratuitously furnished" the tools or machinery with which he accomplishes the task for which he is employed is indeed the rare exception.

The three foregoing cases are the only cases we have been able to find involving a factual situation where the employee is being transported from one place of employment to another. They are almost on all fours with the current case, for the following reasons:

1. Each has an almost identical exclusion clause to the one at bar.

2. In each case the transportation was an integral part of the contract of employment.

3. In each case the employees were transported from one place to another rather than from a place of work to home or from home to the place of work.

4. In each case the injured persons were not performing any active function for their employees at the time the injuries occurred, but were merely riding in the respective vehicles.

5. In each case the original suits by the plaintiffs against the employers were on common law grounds and were not actions under employer's liability or workmen's compensation acts.

We submit that the three foregoing cases, which are the only cases identical in factual matters with the case at bar, are determinative of the fact that in this case the decedent was engaged in the employment of the insured while being transported from one place of work to another.

B. Even where the transportation is merely to or from the place of work to the home of the employee, if the transportation is a part of the contract of employment, the majority of cases hold that the employee is engaged in the employment or business of the employer while thus riding in the vehicle supplied by the employer.

AUTHORITIES

45 C.J.S., p. 916, Sec. 834;

Johnson, et al. v. Aetna Casualty and Surety Co.
(C.C.A. 5th, 1939), 104 F. 2d 22;

Lumber Mutual Casualty Insurance Company v. Stukes (C.C.A. 4th, 1947), 164 F. 2d 571;

Westcott, et al. v. United States Fidelity & Guaranty Co. (C.C.A. 4th, 1946), 158 F. 2d 20;

City of Wichita Falls v. Travelers Insurance Co. (Texas, 1940), 137 S.W. 2d 170.

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Francis v. Scheper, 326 Mich. 447, 40 N.W. 2d 214.

In each of the foregoing cases, there was involved an insurance policy bearing an exclusion clause almost identical with the one at issue herein. However, unlike the present case, all of the cases cited under this point involve the transportation of employees to or from their homes to their place of employment. In each of these cases, either the trial court found, or the appellate court held, that the transportation was an implied or express part of the contract of employment.

In 45 C.J.S., at page 916, the general rule is stated to be as follows:

“A clause excepting from coverage injuries or death sustained by an employee of insured while engaged in any business or occupation of insured, or in the course of employment or business of insured, has been held reasonable and valid unless contrary to statutory regulations. To render such a clause operative, the person injured must not only have been an employee of the insured, but he must also have been injured while he was engaged in insured's business or occupation. An employee injured while riding to or from work in his employer's automobile is not engaged in his employer's business or occupation, at least where the employer has not undertaken to furnish such transportation

as an incident of the employment; *but where the transportation is a term of the employment, the employee is within the exception.*" (Italics supplied)

One of the cases cited by the authors in support of the foregoing quotation is that of *City of Wichita Falls v. Travelers Insurance Co.* (Texas, 1940), 137 S.W. 2d 170, which the appellant states was merely concerned with whether or not an employer-employee relationship existed (Ap. Br., p. 31). However, we feel that the Corpus Juris Secundum authors were careful in their selection of this case for it appears from that case that there were two issues, i.e., the existence of an employer-employee relationship *and* the contention that since the work day was over and the plaintiff injured on the way back, he was not "in the discharge of his duties as an employee" and therefore the exception in the policy for injuries to employees "engaged in the business of the assured" did not apply. The Texas court ruled against this contention, and for that reason the case is a pertinent authority.

In the case of *Westcott v. United States Fidelity & Guaranty Co.*, 158 F. 2d 20, the insured had engaged the decedent to work for him at a casino, and under the express terms of the contract of employment, the decedent was to be furnished transportation to and from her place of employment. While the decedent was thus being transported from her hotel to her place of employment, an accident occurred, resulting in decedent's death. The vehicle in which the decedent was being conveyed was insured by the plaintiff in the case, and the plaintiff brought a declaratory judgment action against

the administrator of the decedent and the insured. The trial court found the insurance company not liable because of an exclusionary clause identical with the one at issue in the case before this Court, and the defendants in that action appealed the decision. In affirming the trial court, Circuit Judge Dobie, speaking for the 4th Circuit Court of Appeals, stated as follows (158 F. 2d 20 at 23):

“The law seems to be pretty well settled that when an employer, by express contract, furnishes to an employee transportation to and from the place of employment, the employee who is injured or killed while being so transported is injured or killed in the course of employment.”

To a similar effect is the case of *Johnson, et al. v. Aetna Casualty & Surety Company*, 104 F. 2d 22. In that case, the transportation feature was not even an express term of the contract, but the custom had been followed for several years of permitting the employees to ride in the employer's truck if they were present when the truck started. Because of the distance from the plaintiffs' homes to the place of employment and the fact that the low wages paid called for such transportation by the employer, the Circuit Court of Appeals for the 5th Circuit, held that the arrangement for riding in the employer's truck was an implied part of the contract of employment, and also held that while so riding they were engaged in the employment of the insured employer and consequently were precluded from any recovery under the policy by virtue of the exclusionary clause contained therein.

The case of *Lumber Mutual Casualty Ins. Co. v. Stukes, et al.* (C.C.A. 4th), 164 F. 2d 571, is an interesting and enlightening decision. In that case the insured hired one Timmons, on a rate basis, to put siding on houses and furnished a truck to Timmons, which the latter used to transport men and material to the job. There was a dispute as to whether or not Timmons was an independent contractor, but that fact is here unimportant. The truck was insured by the plaintiff, and the policy contained an exclusion identical to that here involved. In the trial of the case in the District Court (72 F. Supp. 463), the trial judge, using the same arguments and reasoning employed by the appellant in his brief herein, held that the exclusion clause did not apply, stating as follows, at page 466:

“But, if it be conceded that Eugene David Stukes at the time of his injuries and death was an employee of Marshall, the testimony discloses that he was not at that time ‘engaged in the employment’ of Marshall. At the time of the accident Eugene David Stukes was not engaged in any work, and was not performing any services for Marshall, or for anyone else; he was not entitled to any pay, and was not receiving any pay for any employment. He was merely riding as a fare-paying passenger from the place of his work to his home in a conveyance furnished to Timmons by Marshall.”

However, when this case came before the Circuit Court of Appeals, Justice Parker, in reversing the District Court stated as follows (164 F. 2d 571 at 574):

“And we do not think that the exclusion clause can be held inapplicable on the ground that Stukes was not ‘engaged in the employment’ of either

Marshall or Timmons at the time of the accident, but was riding in the truck as a 'fare paying passenger.' The evidence shows beyond question that he was transported to and from work as an incident of his employment, whether 3% was deducted from his wages on this account or because of the requirement that unemployment insurance be paid. Such transportation was a part of his contract of employment; and there can be no question that under the law of South Carolina he enjoyed the status of an employee engaged in the employment at the time of the accident which resulted in his death."

In the instant case the appellant has alleged and admits that the transportation of the decedent was a part of her contract of employment, so under Justice Parker's reasoning there should be no question as to the applicability of the exclusion clause. Furthermore, we think this case effectively disposes of the continually repeated claims of the appellant that the exclusionary clause is ambiguous.

The only case expressing a contrary rule to that set forth in the cases above is *Francis v. Scheper, et al.*, 326 Mich. 447, 40 N.W. 2d 214, cited and relied on by the appellant in his brief on pages 17 and 18 thereof. In that case the plaintiff was employed by the insured on an hourly basis. The insured provided transportation to the employee from his home to the place of work and back. The employee was injured while being transported home after working hours in the employer's truck. In the original action brought against the employer, the trial court instructed the jury that the plaintiff could not recover against the employer unless the transportation of the plaintiff was a part of the con-

sideration of the contract of hire and the jury so found. Accordingly, it may be said that this is a case where the transportation was a part of the employment contract. However, in the original action the plaintiff did not claim that he was an employee of the insured, but on the contrary, claimed that he was a passenger for hire in the insured's truck. When the injured plaintiff sought to recover against the insured's company, that company defended on the ground that the plaintiff was an employee of the insured and came within an exclusion clause identical to the one in the case at bar. The Supreme Court of Michigan held against the insurance company and, as stated in the quotation on page 18 of the appellant's brief, particularly held that the words "engaged in the employment" did not exclude the plaintiff from recovery. Not a single one of the leading cases on this particular type of case was cited by the Michigan Supreme Court, but it merely placed reliance upon a number of cases calling for strict construction of provisions of insurance policies against the insurer.

It is to be noted that in the Michigan case the Supreme Court of Michigan took particular pains to point out that (40 N.W. 2d at 218):

"Plaintiff did not claim in the principal case that the relation of employer and employee had anything to do with the liability of Houck to plaintiff further than that the furnishing of the ride was part of plaintiff's compensation for his work as a painter. Plaintiff nowhere in the main case claimed that he (plaintiff) was engaged in Houck's employment at the time of the accident.

"Plaintiff's claims in the main case are entirely consistent with his claims in the instant case, in which he claims Houck is indebted to him for the balance of the judgment in the principal case, and that consequently the casualty company is liable to him for such balance.

"Plaintiff's recovery in the principal suit therefore is based upon his claim that he was riding not as an employee but as a passenger for hire, as distinguished from a guest passenger. Plaintiff was not engaged in the employment of the principal defendant at the time the accident occurred, hence the clause in garnishee defendant's insurance policy excluding coverage of employees while engaged in the employment of the insured is not applicable in the case at bar."

In light of the authorities, we submit that the Michigan decision was wrong. However, right or wrong, it is clearly not applicable herein, for the following reasons:

1. The Michigan decision is a "work to home" case and not one of "place to place," as is the instant case.

2. Although the jury found the transportation was a part of the employment, the Supreme Court carefully pointed out that plaintiff was free to go anywhere he chose at the end of the day.

3. In that case the plaintiff at all times denied that he was an employee, but claimed he was a passenger for hire, whereas here the plaintiff in the court below claimed the decedent was an employee being transported pursuant to "her contract of employment."

C. The instant case is not controlled by those authorities wherein the transportation is not a part of the contract of hire but is a mere "gratuity."

On page 17 to 20 of his brief, appellant has cited a number of cases which he states to be similar to the case at bar and determinative of the problems here involved. We have already discussed the one case which is in point and shall now proceed with the remainder of the cases cited on those pages, with brief comments thereon to show their inapplicability.

The case of *B. & H. Passmore Metal and Roofing Co. v. New Amsterdam Casualty Co.* (10th Cir.) 147 F. 2d 536, is not in point, although analogous. In that case the decedent employee sometimes drove his own automobile to work and sometimes rode in the insured employer's truck. The Circuit Court of Appeals, in holding that an exclusionary clause, similar to the one in the case at bar, did not apply, held at page 538 as follows:

"At the time of the accident Little was not engaged in any work and was not performing any service for Passmore, and he was not receiving any pay for his time. *He was simply riding from the place of work to Passmore's shop in a conveyance gratuitously furnished by Passmore.*"

It is apparent from the foregoing that this is not a case where the transportation was an integral part of the employment, either expressly or by implication.

In the case of *Elliott v. Behner*, 150 Kan. 876, 96 P. 2d 852, (App. Br., P. 20) the Supreme Court of Kansas there determined that an exclusionary clause similar to the case

at bar was not applicable and further found that the finding of the trial court to the effect that the transportation was a part of the employment was "not supported by the other findings and the undisputed evidence." Thus, this case is also one which does not control a situation where the transportation is an integral and agreed part of the contract of employment. To the same effect are the next two cases cited by the plaintiff, *Green v. Travelers Insurance Company*, 286 N.Y. 358, 36 N. E. 2d 620, and *State Farm Auto Insurance Co. v. Skluzacek, et al.*, 208 Minn. 443, 294 N.W. 413, in both of which the transportation was not a part of the contract of employment, but merely a gratuity furnished by the employer for those of the employees wishing to avail themselves of it. The case of *Braley Motor Co., Inc., v. Northwest Casualty Co.*, 184 Wn. 47, 49 P. 2d 911, is not determinative of the matter in issue at all, for the principal and only point involved in that case was whether or not the plaintiff was an employee of the insured, and having found that plaintiff was not insured's employee, the remaining language in the exclusionary clause was not involved.

D. Strict Construction of the Insurance Policy is Not Required.

Throughout his argument on the second specification of error and particularly on pages 16 and 17 of his brief, appellant has urged that since appellee prepared the contract in this case it is to be strictly construed against it. The Oregon cases cited for this proposition do not sustain appellant's statement, but do stand for the normal rule

that if a provision is ambiguous and susceptible of two or more meanings the court will construe the policy against the insurer. We have no quarrel with that rule, but the appellant has failed to demonstrate the requirements to bring it into play in this case. For that reason we are not taking this court's time to discuss the cases thereon.

E. Decisions on Workmen's Compensation Cases are Not Controlling in This Common Law Action.

Appellant cites *Lesser v. Great Lakes Casualty Co.*, 171 Or. 174, 135 P. 2d 810, for the proposition that cases involving the Workmen's Compensation Laws were not controlling in that case which involved an action by the assured under his policy for a recovery of the amount of a judgment paid by him to an independent contractor whom the insurance company asserted was an employee. We readily agree to the soundness of that decision and we think it supports another statement of appellant at the top of page 16 of his brief that cases under such remedial statutes throw little light on the matter at issue. Yet in spite of all this, appellant has more than three pages of his argument discussing a compensation case which he asserts is controlling of this case. We refer to *Lamm v. Silver Falls Timber Co.*, 133 Or. 468, 277 P. 91, 286 P. 527, 291 P. 375 (App. Br. pp. 21-24 and 32). Inasmuch as the court will undoubtedly read this leading Oregon case, we shall not burden the court with the details of the facts and the various decisions on the original opinion, the rehearing and the second rehearing. All of the quotations contained in the plaintiff's brief, taken from the

various phases of that opinion, are accurately stated. As we understand the appellant's contention with respect to the *Lamm* case, it simply is that the broad interpretations of the Workmen's Compensation Act should not be applied to this case.

We believe that the *Lamm* case is inapplicable here for the following reasons:

First: It is a decision wholly concerned with giving a broad interpretation of the Workmen's Compensation Act whereas this case is a common law action.

Second: The court in the *Lamm* case recognized the different rule applicable to common law actions, as will be noticed from the quotation from that case set forth at pages 13-14, *supra*.

What has been said above is equally applicable to the Washington decisions on Workmen's Compensation cases set forth on pages 24 and 25 of appellant's brief and we shall not discuss the same.

F. Appellant's Authorities on the Meaning of "engage" and on the Existence of an Employer-Employee Relationship are Not Applicable to the Facts of This Case.

At the bottom of page 20 of his brief, appellant cites a series of cases for the proposition that the word "engage" connotes "action in performing some duty, devoting attention and effort." The authorities cited cover cases from whether a boat was "engaged" in fishing to whether a soldier was "engaged" in war. There are literally hun-

dreds of cases in which this word has been construed (see, for instance, Words and Phrases, Vol. 14, pp. 589-629), and we submit that it is of no aid in the determination of this case to go into such unrelated cases when the word in its proper context has been so frequently considered in decisions on this very type of case. Accordingly, we shall not discuss this group of cases cited by appellant.

One case which the appellant has cited and which we believe needs to be discussed is that of *Rickenbaker v. Layton*, et al, 59 F. Supp. 156, (Ap. Br. P. 25). Appellant in his discussion of this case, states that "the facts in the *Rickenbaker* case are substantially the same as the facts under consideration here," and then proceeds to quote at length from said case. We think that if appellant's counsel had read this case carefully he would not have made the statement that he did as to the similarity between the facts of the case at bar and those of the *Rickenbaker* case. In this case, counsel for the appellant has admitted that the decedent was an "employee" of the assured. The principal matter in contention in the *Rickenbaker* case was whether or not there was any employment at all at any time. The facts of that case simply were that a rural mailman was asked by his friend, the employee of the assured, to drive out along a rural mail route with the friend in order to point out the location of certain persons living on the mail route. We think two findings of the court clearly show the case to be inapplicable. They are findings Nos. 8 and 9 appearing on page 163 of the opinion, and are as follows:

"8. That there was no agreement between Smith, either as an individual or as agent of the insured, and

the plaintiff that the plaintiff would be compensated for any services rendered or for any information furnished on the afternoon in question;

“9. That the plaintiff has never been paid, or offered any pay, for whatever he may have done on the occasion in question, nor has he ever asked for any pay therefor, notwithstanding more than five years have now elapsed since the event;”

The court went on to state that regardless of what the plaintiff in that case might have been doing for the benefit of the insured's driver by pointing out the locations of certain residences, that the accident happened some two hours after the parties had gone over the mail route in question. Accordingly, the quotation appearing on page 25 of the appellant's brief must be read in light of those facts, and we heartily concur in the decision of the district judge in that case on those facts.

III.

Third and Fourth Specifications of Error.

ARGUMENT.

These two specifications of error will be determined by the Court's decision as to the first two specifications of error, and therefore appellee deems no separate argument necessary.

CONCLUSION

Public liability policies such as the one involved herein have a definite and useful place in our automobile age. But they were not designed nor intended to supplant the provisions of the workmen's compensation laws nor the employer's liability laws, nor specific employee insurance. It is patent on the face of the policy here involved that this policy was designed to protect members of the public and not Kalahar's employees.

We see no occasion for attempting to pin the designation "ambiguous" on phrases having a common and clear meaning. Insurance companies and their contracts have not always received impartial treatment, but that is no reason for endeavoring to write new contracts between them and their insureds when the agreements are clear, concise and readily understood by laymen.

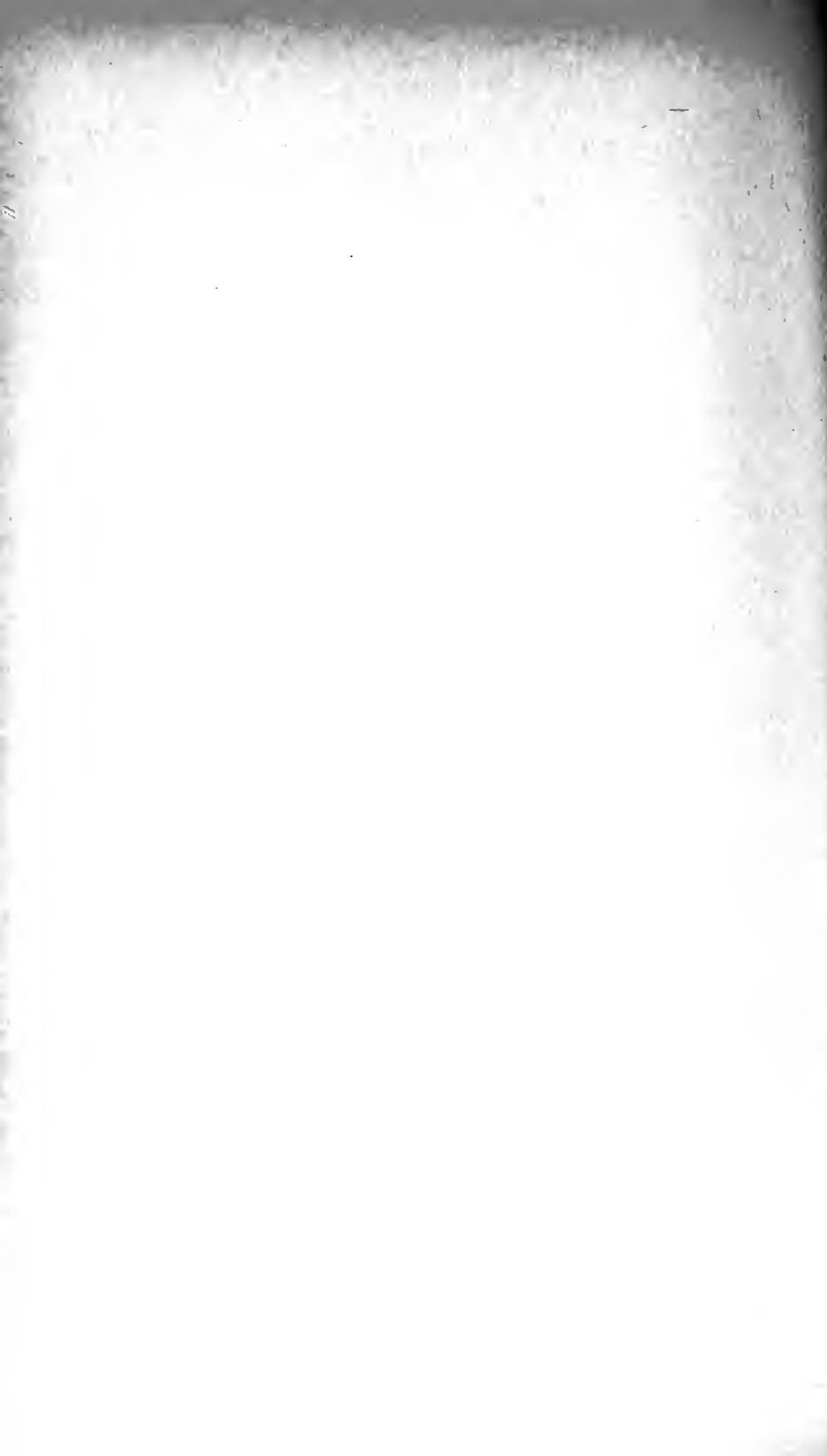
The appellee herein is entitled to have the judgment of the District Court affirmed. The employment issue herein sought to be litigated by plaintiff already has been decided by the Circuit Court of the State of Oregon on allegations, issues and instructions of the plaintiff's own choosing. To get his judgment below, he took a definite and unalterable position that at the time of her death decedent was the employee of the insured, and was being transported by him pursuant "to her contract of employment." Unless, at the time of the accident, she and the driver were engaged in their respective employments, the plaintiff could not have recovered from Kalahar. That having been determined, the same is *res judicata*, and the defendant is entitled to judgment.

However, even if the plaintiff can in this action retry that issue, the authorities are clear that under an exclusion clause such as we have in this case, there is no liability upon the part of the insurer for injuries to or death of employees who are being transported by the employer-insured pursuant to the contract of employment between them, especially when that transportation is between two different places where work is to be done.

In conclusion, we respectfully submit that the trial court's findings, conclusion and judgment were correct and should be affirmed.

Respectfully submitted,

HERBERT C. HARDY,
CAKE, JAUREGUY & TOOZE,
Attorneys for Appellee.



United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT CARL GETLIN, Administrator of the
Estate of CORINNE CONSTANCE GETLIN,
Deceased,
Appellant,

vs.

MARYLAND CASUALTY COMPANY,
a Corporation,
Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the
District of Oregon.

ANDERSON & FRANKLIN, and
W. A. FRANKLIN,
317 S. W. Alder Street
Portland, Oregon
Attorneys for Appellant.

CAKE, JAUREGUY & TOOZE, and
HERBERT C. HARDY,
1220 Equitable Building,
Portland, Oregon
Attorneys for Appellee.

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PAUL P. O'BRIEN
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United States
COURT OF APPEALS
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ROBERT CARL GETLIN, Administrator of the
Estate of CORINNE CONSTANCE GETLIN,
Deceased,
Appellant,

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Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the
District of Oregon.

I.

**APPELLANT'S REPLY TO APPELLEE'S
FIRST ARGUMENT**

We have no quarrel with appellee's statement of the doctrine of res judicata. Nor do we disagree with appellee's contention that the matter is to be determined

under the second phase of the doctrine. It is the contention of the appellant that there was no issue in the state court as to whether or not decedent was "engaged in the employment of the assured," at the time of the accident. Neither was this question adjudicated or necessarily involved.

Appellee complains that we have failed to include some of the allegations of the complaint in our opening brief. Appellee then sets forth an example of an employer taking an employee on a Sunday fishing trip and points out, quite correctly, that under such circumstances the employee is a guest. Obviously, under such circumstances, *the injury did not arise out of the employment*.

A much better example would be as follows:

A employs B to work at a plant which is five miles from B's home. A furnishes B transportation from home to plant, and from the plant back to his home. However, B is paid only for the time he is working at the plant. B is injured while being transported to the plant in A's vehicle. Under such circumstances (1) B is not a guest within the meaning of the guest statute; (2) the injury arises "out of the employment;" (3) B is not "engaged in the employment." We think the foregoing illustration is more analogous to the situation presented here than the appellee's fishing trip example.

Appellee argues that in the state court appellant alleged specifically and with care that the transportation was pursuant to decedent's contract of employment with the assured. There is no question about this. It was specifically alleged in this manner to come within the rule of *Lamm v. Silver Falls Timber Co.*, 133 Or. 468.

In that case the defendant in its answer specifically alleged "*that prior to November 9, 1926, plaintiff and defendant entered into a contract of employment and, a part thereof, plaintiff entered upon the premises of the defendant at Silverton, Oregon, and rode upon its logging train up to the woods where he was to work; that, on November 6, 1926, and while in the defendant's employ, plaintiff rode to Silverton on the logging train under his contract of employment. * * **" (p. 474.) (Italics ours.)

Thus it becomes perfectly obvious that under the decision of the Lamm case, and the companion case of *Varrelman v. Flora Logging Co.*, 133 Or. 541, the transportation in each instance was "pursuant to the contract of employment," and yet the Court carefully pointed out that under such circumstances the injury "arose out of the employment," although the injured employee was not "engaged in the employment."

The appellee at page 8 of its brief refers to certain "alleged" contentions of the appellee in the District Court. It is significant that the appellee does not deny that these contentions were made in the District Court. Apparently the appellee has now abandoned this former line of argument and now chooses to blithely ignore the Court's specific instructions to the jury in the state court case that before the plaintiff could recover it must be shown (1) that both deceased and Rodgers were employees, (2) that Rodgers was driving by authority of and at the express direction of Kalahar, and (3) that decedent "*was not permitted to participate in or direct the operation of or exercise control over the operation of the car in which she at the time was riding.*"

It appears quite clear that the specific issue here was not in issue, directly adjudicated or necessarily involved in a determination of the state court action.

II.

APPELLANT'S REPLY TO APPELLEE'S SECOND ARGUMENT

We believe it to be quite clear that under the authorities that the appellant has cited in his opening brief, the decedent was not "engaged in the employment" within the meaning of the policy at the time of the fatal accident.

Appellee in its brief has not denied that decedent was paid only on a commission basis for the subscriptions sold during the time she was actually soliciting. Neither has appellee alleged that decedent was doing anything more than passively riding in the vehicle at the time of the fatal accident.

Appellant would like to point out to the Court that most of the cases cited in appellee's brief are not in point, or that they are distinguishable.

Appellee contends that we cannot rely upon *Lamm v. Silver Falls Timber Co.*, 133 Or. 468, for the reason that it involved workmen's compensation. On page 13 of its brief appellee quotes extensively from Labatt's Master and Servant, as follows:

"A servant who, at the time of the accident in suit was being transported on a railway car or other vehicle furnished for the purpose of facilitating the

performance of his work, is deemed to have been *injured in the course of his employment, and therefore can not recover if the injury was the result of risk known to and appreciated by him. * * ** (Italics ours.)

Thus it is apparent that the rule at common law was the same as we have heretofore pointed out in appellant's opening brief. If the employee was injured while being transported in the employer's vehicle in order to facilitate the performance of his work the injury "arose out of and within the course of the employment," but if the right of the master to exact the performance of services was dormant then it could not be said that the employee was injured while "engaged in the employment."

Actually all that Mr. Labatt was dealing with was the common law defense of "assumption of risk." However it does indicate that the rule at common law was precisely the same as that announced by the court in *Lamm v. Silver Falls Timber Co.*, supra.

At page 14 of its brief the appellee contends that it is obvious from the nature of the employment that it was essential to the employer that his employees travel in the vehicle provided. While it was undoubtedly preferable it certainly was not essential. All that was essential was that the salesmen be at the particular town when required. As a matter of fact the majority of them made use of the vehicle provided by Kalahar. However, this was not an infallible rule.

We have discussed the case of *Webb v. The American Fire & Casualty Company* (Fla., 1941), 5 So. 2d 252, in appellant's opening brief. Appellee relies upon this case

but apparently does not refute our contention that the case is expressly predicated upon two cases which are not in point. An examination of this case and the two cases cited therein will substantiate our position.

Likewise an examination of the case of *Gilmore v. The Royal Indemnity Company, et al.*, Ohio Court of Appeals, 24 Automobile Cases 1091, indicates the Ohio court makes no distinction between the phrases "arising out of the employment" and "engaged in the employment." That may be the rule in Ohio but certainly not in Oregon. Actually all the Ohio court did decide was that the injury "arose out of the employment."

Let us now turn to appellee's contentions with regard to *State Farm Mutual Automobile Insurance Company v. Brooks*, 136 F. 2d 807 (Ap. Br. p. 19, 20). In an attempt to place the case on all fours with this case appellee, as its second contention, asserts, "We agree that the daily wage in the Brooks case *probably* took into account the time of transportation, but it is just as surely true that the rate of commission in this case *must have taken into account the travel time necessary between cities and states.*" This contention appellee knows to be incorrect. Decedent was paid strictly on a commission basis and if she sold nothing she was paid nothing.

Appellee cites the case of *Westcott v. U. S. Fidelity & Guaranty Co.*, 158 F. 2d 20 (Ap. Br. 24). In that case the facts are substantially as set out in appellee's brief. However, in addition to an exclusion substantially the same as the one in question here, the insurance policy provided it did not apply "to any employee with respect to

injury to or death of another employee of the same employer in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of the employer.” It appears from the facts that the insured was one Geo. T. Westcott, and that one Geo. L. Mann, as insured’s agent, was driving the deceased to the insured’s casino at the time of the accident. The Court stated the rule to be:

“When an employer by express contract furnishes to an employee transportation to and from the place of employment, the employee who was injured while being so transported *is injured or killed in the course of the employment.*” (Italics ours.)

It is apparent from reading the case that it was decided because of the exception hereinbefore quoted and not because of an exception similar to the one at issue here. The case is no authority at all for the proposition for which it was cited in appellee’s brief.

Appellee relies upon *Johnson v. Aetna Casualty & Surety Co.*, 104 F. 2d 22 (Ap. Br. 25). In this case the Federal District Judge held that at the time of the collision plaintiffs were employees of the insured and “in the course of their employment,” and that the policy did not cover the liability. In affirming the District Judge the Circuit Court of Appeals stated the general rule to be,

“It has often been held that the employees riding free to and from their work in the employer’s vehicle continue to be employees and are not passengers.”

The opinion then points out that the plaintiff, being an employee, could not recover under the policy, since the policy carried an exception relieving the insurance

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“It has often been held that the employees riding free to and from their work in the employer’s vehicle continue to be employees and are not passengers.”

The opinion then points out that the plaintiff, being an employee, could not recover under the policy, since the policy carried an exception relieving the insurance

company from liability if the insured might be held liable under a *workmen's compensation law*. Since the employee was injured within the course of his employment, the employee could make a claim under the compensation act. The case does not even discuss, and is no authority that a workman being furnished gratuitous transportation is "engaged in the employment."

The only case cited by appellee which would appear at all to support its position is the case of *Lumber Mutual Casualty Co. v. Stukes*, 164 F. 2d 571 (Ap. Br. 26). In that case the main contention of the plaintiff was that decedent was not an employee at the time of the fatal accident, but was a fare-paying passenger, as he was charged three per cent of his wages for transportation. However, the Court found that the three per cent was in reality deducted to pay unemployment insurance which the South Carolina statutes did not allow the employer to deduct. Since this was a mere subterfuge, the Court found that it did not affect the employer-employee relationship. The Court then goes on to say:

"There can be no question that under the law of South Carolina, decedent enjoyed the status of an employee engaged in employment at the time of the accident which resulted in his death."

We believe that this decision is inherently wrong, and is opposed to all of the well-reasoned cases on the matter, and even if it be the settled law of the State of South Carolina, it is certainly not the law of the State of Oregon.

Appellee has discussed the case of *Francis v. Scheper*, 326 Mich. 447, at pages 27, 28 and 29 of its brief. Appellee purports to find a good deal of difference between this

case and the case at issue here. We feel that it would be difficult to find a case more on all fours. As pointed out at the bottom of page 28 of appellee's brief, the plaintiff Francis did not claim in the principal case that the relation of employer and employee had anything to do with the liability of assured, other than the furnishing of the ride was part of plaintiff's compensation for his work. Francis in the main case did not claim he was engaged in assured's employment at the time of the accident. That is the identical situation here.

Appellee argues that public liability policies, such as the one involved herein, have a definite and useful place in our automobile age. We have no quarrel with appellee's contention in this regard. However, the insurance policy is nothing more nor less than a contract that appellee voluntarily entered into. Appellee has received the premium on this policy, but now seeks to avoid its obligations under the policy. If insurance carriers desire to avoid the obligations of public liability policies which they have issued, they should advance a more plausible reason than their well known reluctance to pay.

In this particular case the appellee, at the time it issued the policy, knew that it was to cover a Chevrolet station wagon. Appellee knew the business of the assured, and listed his occupation as a "salesman" (Tr. p. 28),. Appellee knew that the assured was engaged in hauling carloads of young people about the country in the furtherance of his business of a "salesman." The policy was issued specifically to Kalahar to cover his liability in the event someone was accidentally injured in the operation of the insured vehicle.

We submit that the exception in the policy does not apply to the factual situation in this instance, and that the judgment of the District Court should be reversed.

Respectfully submitted,

ANDERSON & FRANKLIN,

By W. A. FRANKLIN,

Attorneys for Appellant.

No. 13047

**United States
Court of Appeals**
for the Ninth Circuit.

STANDARD ACCIDENT INSURANCE COM-
PANY OF DETROIT, MICHIGAN,

Appellant,

VS.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

VS.

STANDARD ACCIDENT INSURANCE COM-
PANY OF DETROIT, MICHIGAN and
THOMAS B. MACK,

Appellees.

Transcript of Record

Appeals from the United States District Court,
Southern District of California
Central Division.

FILED

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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN
CLERK

No. 13047

United States
Court of Appeals
for the Ninth Circuit.

STANDARD ACCIDENT INSURANCE COM-
PANY OF DETROIT, MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

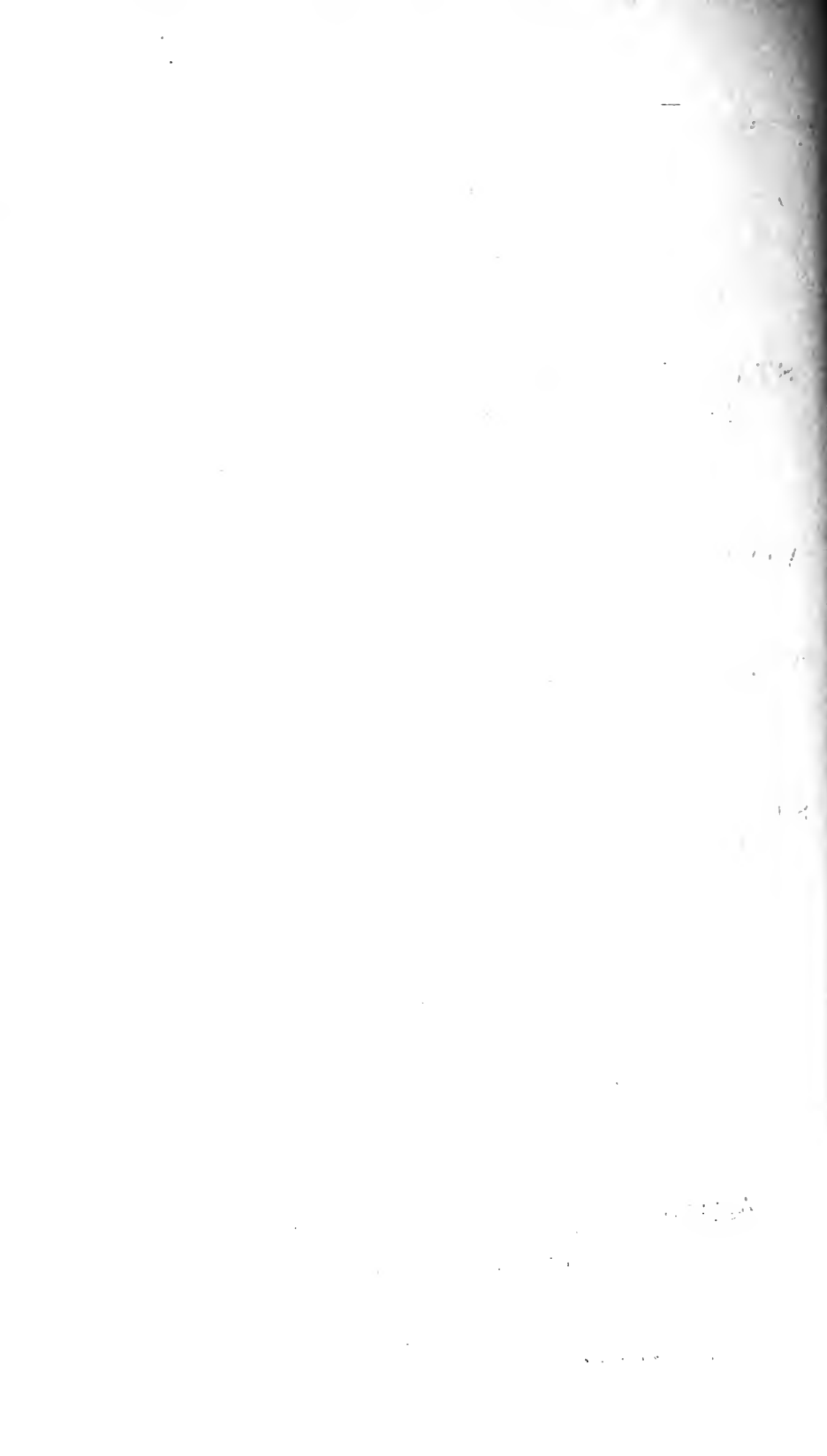
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STANDARD ACCIDENT INSURANCE COM-
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Appellees.

Transcript of Record

Appeals from the United States District Court,
Southern District of California,
Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant and Cross-Appellee:

FULCHER & WYNN,
411 West 5th St.,
Los Angeles 13, Calif.

For Appellee and Cross-Appellant:

NEIL D. HEILY,
515 S. "A" Street,
Oxnard, Calif.

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In the District Court of the United States
Southern District of California, Central Division
No. 12327-HW

VIVIAN WINGET,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COM-
PANY OF DETROIT, MICHIGAN, a Cor-
poration, THOMAS B. MACK, JOHN DOE I
and JOHN DOE COMPANY,

Defendants.

PETITION FOR REMOVAL OF CAUSE TO
UNITED STATES DISTRICT COURT

To the Honorable District Court of the United
States for the Southern District of California:

Your Petitioner, Standard Accident Insurance
Company of Detroit, Michigan, a corporation rep-
resents as follows:

I.

That it is a corporation organized and existing
under the laws of the State of Michigan, authorized
to do business and doing business in the State of
California, and authorized therein to write, execute,
and deliver Automobile Personal Injury Policies
of the type and kind hereinafter referred to; that
the plaintiff is a citizen and resident of the State of
California.

II.

That there is an actual and bona fide controversy presently existing between plaintiff and this defendant as to the liability of this defendant to plaintiff under the policy of Automobile Personal Injury [2*] Insurance referred to in the Complaint on file in the Superior Court of the State of California, in and for the County of Ventura, numbered 37786 in the files of said court.

III.

That although this defendant is not the sole defendant in the state court action above described, the above-mentioned claim against this defendant, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars, (\$3,000.00); that the plaintiff and this defendant are citizens of different states, and that the claim asserted by plaintiff against this defendant upon said policy of insurance is one which would be removable to this Court if sued upon alone pursuant to the provisions of section 1332 and 1441, subdivision (c) title 28 of the United States Code; that the claim or claims of plaintiff asserted against the remaining defendants in said state court action involve claims which might otherwise be non-removable but which may be heard by and determined by this Court under the provisions of said section 1441(c) of the United States Code. That attached hereto, made a part hereof as fully as though at length set out, marked Exhibit "A," is a true and correct copy of the

*Page numbering appearing at foot of page of original Certified Transcript of Record.

policy of insurance referred to and described in plaintiff's Complaint, together with all riders and endorsements then or thereafter issued by defendant to plaintiff and attached to or made a part of said policy.

That attached hereto marked Exhibit "B" and made a part hereof as fully as though at length set out is a true and correct photostatic copy of the Summons and Complaint issued by the Superior Court of the State of California in and for the County of Ventura, together with Order to Show Cause, Temporary Restraining Order, and a Memorandum of Authorities in Support of Order and Injunction, which include all process pleadings and orders served upon this defendant in such state court action.

That said Summons and Complaint and other documents above [3] described or served upon your Petitioner within 20 days of the filing of this Petition for removal to the above-entitled Court.

Wherefore, your Petitioner prays that this Court accept jurisdiction of the subject matter, the controversy set forth in the Complaint filed in the Superior Court of the State of California in and for the County of Ventura between the plaintiff and this defendant as well as any other claims or causes of action which might not otherwise be removed to this Court; that all further proceedings in said state court be stayed; that this Court enter such orders, decrees, and judgments as may be proper in the premises; and that all further proceedings be held in the District Court of the United States for the

Southern District of California, Central Division.

Dated September 22, 1950.

By /s/ FREEMAN A. REED,
Claims Manager, Petitioner.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,
Attorneys for Petitioner. [4]

EXHIBIT B

In the Superior Court of the State of California
in and for the County of Ventura

No. 37786

VIVIAN WINGET,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COM-
PANY, a Corporation, THOMAS B. MACK,
JOHN DOE I and JOHN DOE COMPANY,
Defendants.

COMPLAINT

Comes now the plaintiff in the above-entitled ac-
tion and for cause of action against the defendants,
and each of them alleges as follows:

I.

That plaintiff is a married woman over the age
of 18 years and is one and the same person as Viv-

ian Lee DeLozier named in that certain action in the Superior Court of the State of California, in and for the County of Ventura entitled Vivian Lee DeLozier, a minor, by Lawrence E. DeLozier, her guardian ad litem, Plaintiff vs. Billie Ray Towry, John Doe I and John Doe Company, a corporation, Defendants, being action #36005.

II.

Said plaintiff is informed and believes and therefore alleges that defendant Standard Accident Insurance Company is a corporation duly organized, operating and existing under and by virtue of the laws of the State of Michigan and that said corporation is and has been [16] during all of the times hereinafter mentioned doing business in the State of California and has as its agent for service of process in the State of California one Roy W. Smith of 206 Sansome, San Francisco 4, California. That said defendant Standard Accident Insurance Company is hereinafter referred to as "Standard."

III.

That defendant Thomas B. Mack is one and the same person as the plaintiff in that certain action entitled Thomas B. Mack, Plaintiff vs. Billie Ray Towry, et al., Defendants on file in the Superior Court of the State of California in and for the County of Ventura as action #35511 and that said defendant is hereinafter referred to as "Mack." That said defendant is a citizen and resident of Ventura County, California.

Southern District of California, Central Division.

Dated September 22, 1950.

By /s/ FREEMAN A. REED,
Claims Manager, Petitioner.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,
Attorneys for Petitioner. [4]

EXHIBIT B

In the Superior Court of the State of California
in and for the County of Ventura

No. 37786

VIVIAN WINGET,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COM-
PANY, a Corporation, THOMAS B. MACK,
JOHN DOE I and JOHN DOE COMPANY,
Defendants.

COMPLAINT

Comes now the plaintiff in the above-entitled action and for cause of action against the defendants, and each of them alleges as follows:

I.

That plaintiff is a married woman over the age of 18 years and is one and the same person as Viv-

ian Lee DeLozier named in that certain action in the Superior Court of the State of California, in and for the County of Ventura entitled Vivian Lee DeLozier, a minor, by Lawrence E. DeLozier, her guardian ad litem, Plaintiff vs. Billie Ray Towry, John Doe I and John Doe Company, a corporation, Defendants, being action #36005.

II.

Said plaintiff is informed and believes and therefore alleges that defendant Standard Accident Insurance Company is a corporation duly organized, operating and existing under and by virtue of the laws of the State of Michigan and that said corporation is and has been [16] during all of the times hereinafter mentioned doing business in the State of California and has as its agent for service of process in the State of California one Roy W. Smith of 206 Sansome, San Francisco 4, California. That said defendant Standard Accident Insurance Company is hereinafter referred to as "Standard."

III.

That defendant Thomas B. Mack is one and the same person as the plaintiff in that certain action entitled Thomas B. Mack, Plaintiff vs. Billie Ray Towry, et al., Defendants on file in the Superior Court of the State of California in and for the County of Ventura as action #35511 and that said defendant is hereinafter referred to as "Mack." That said defendant is a citizen and resident of Ventura County, California.

IV.

That defendants John Doe I and John Doe Company are sued herein under fictitious names for the reason that their true names are not at this time known and that when said true names have been ascertained by the plaintiff, she will ask that such true names be inserted in this complaint with apt and proper words to charge said defendants.

V.

That the two actions above mentioned being #36005 and #35511 were duly consolidated for trial and trial was had thereon and on the 31st day of March, 1950, judgments were entered on the verdicts in said actions in favor of the plaintiff and against defendant Billie Ray Towry therein named in the sum of Thirty-Two Thousand and no/100 (\$32,000.00) Dollars with interest thereon at the rate of seven (7) per cent per annum from the 30th day of March, 1950, together with costs of suit and in favor of defendant Mack, therein named as plaintiff Thomas B. Mack, and against the defendant therein named Billie Ray Towry in the sum of Fifteen Thousand and [17] no/100 (\$15,000.00) Dollars together with interest thereon at the rate of seven (7) per cent per annum from the 30th day of March, 1950, and together with costs of suit and that said judgments were entered and recorded in Book 27 of Judgments at Page 409, records of Ventura County Clerk, Ventura, California. That said judgments are final.

VI.

That the judgments so rendered on behalf of plaintiff and on behalf of defendant Mack as hereinabove described were for bodily injuries suffered by plaintiff and defendant Mack in an automobile accident while riding in the vehicle of said Billie Ray Towry on the 26th of January, 1949, at which time said Billie Ray Towry was driving his said vehicle on West Fifth Street near Oxnard, Ventura County, California.

VII.

That at the said time and place of said accident above mentioned there was in full force and effect a certain automobile bodily injury liability policy #J894065 issued by the defendant Standard to said Billie Ray Towry, also known as Billy Towry, under the terms of which policy the defendant Standard agreed to pay on behalf of said Billy Towry all sums which he might become obligated to pay by reason of liability imposed upon him by law for damages because of bodily injury sustained by any person or persons caused by accident and arising out of the ownership, maintenance or use of the vehicle above-mentioned up to the limit of Twenty Thousand and no/100 (\$20,000.00) Dollars for such accident.

VIII.

That plaintiff is informed and believes and therefore alleges that said Billy Towry complied with all the provisions and conditions of said policy and that the same continued to be in full force and

effect and is now in full force and effect and was, especially, [18] on the 31st day of March, 1950, the date when the judgments above mentioned were entered, in full force and effect, insofar as said judgments are concerned.

IX.

That by reason of the provisions of said policy, defendant Standard is obligated to pay toward the satisfaction of said judgments above described the sum of Twenty Thousand and no/100 (\$20,000.00) Dollars together with interest thereon at seven (7) per cent per annum from the 30th day of March, 1950, and costs of suit as in said judgment provided. That defendant Standard has refused to pay said sums or any portion thereof, and, as plaintiff is informed and believes, and therefore alleges, said Billy Towry has no assets whatsoever to apply on said judgments except said policy and said judgments remain wholly unsatisfied.

X.

That the total amount of said two judgments above mentioned is Forty-Seven Thousand and no/100 (\$47,000.00) Dollars and that the Thirty-Two Thousand and no/100 (\$32,000.00) Dollar judgment on behalf of plaintiff is 68.0851% of said Forty-Seven Thousand and no/100 (\$47,000.00) Dollars and that plaintiff is entitled to 68.0851% of the principal sum of Twenty Thousand and no/100 (\$20,000.00) Dollars which defendant Standard is obligated to pay under the terms of said policy, which is the sum of Thirteen Thousand Six Hun-

dred Seventeen and 02/100 (\$13,617.02) Dollars, in partial satisfaction of said judgment on behalf of plaintiff against said Billy Towry.

XI.

That plaintiff is informed and believes and therefore alleges that defendant Mack claims he is entitled to Ten Thousand and no/100 (\$10,000.00) Dollars of said Twenty Thousand and no/100 (\$20,000.00) Dollars which said defendant Standard is obligated to pay under the terms of said [19] policy.

XII.

That plaintiff is informed and believes and therefore alleges that unless restrained from so doing, the defendant Standard will pay to defendant Mack a portion or all of said Ten Thousand and no/100 (\$10,000.00) Dollars claimed by said defendant Mack in return for a satisfaction and release of said defendant Standard under the terms of said policy which would result in great and irreparable injury to the plaintiff, in this, to wit, that plaintiff is informed and believes and therefore alleges that she would be unable to thereupon collect anything in excess of the principal sum of Ten Thousand and no/100 (\$10,000.00) Dollars payable to her under the terms of said policy and on said judgment against Billy Towry and that she could collect nothing from said defendant Mack, and that plaintiff would be hindered and delayed in collecting the amount due her on said judgment and the complete enforcement of any judgment rendered in this ac-

tion would be prevented. That defendant Standard should be required to pay into this Court the total sum of Twenty Thousand and no/100 (\$20,000.00) Dollars due on said policy together with interest at seven (7) per cent per annum from the 30th day of March, 1950, and the costs of plaintiff and defendant Mack described in said two judgments, and that thereupon said principal sum with interest should be divided and paid in the ratio of 68.0851% to plaintiff and 31.9149% to defendant Mack together with their respective costs.

Wherefore, plaintiff prays judgment as follows:

1. That this Honorable Court make an order enjoining and restraining the defendant Standard Accident Insurance Company, its agents, servants or employees, from in any manner paying to or settling with defendant Thomas B. Mack for any sum or sums due or owing or alleged to be due or owing under the terms of that certain automobile bodily injury liability policy #J894065 issued by said Company to Billy Towry, pending final determination of this action; [20] and that said defendant Standard Accident Insurance Company be required to appear before the above-entitled Court at a specified time to show cause, if any it has, why such restraining order should not be made a temporary injunction until the final determination of this action.

2. That defendant Standard Accident Insurance Company be ordered to pay into the above-entitled Court the principal sum of Twenty Thousand and

no/100 (\$20,000.00) Dollars due under the terms of said policy together with interest thereon at the rate of seven (7) per cent per annum from the 30th day of March, 1950, and that thereupon, out of said proceeds so paid into Court, this Court award to plaintiff the sum of Thirteen Thousand Six Hundred Seventeen and 02/100 (\$13,617.02) Dollars together with interest thereon at the rate of seven (7) per cent per annum from the 30th day of March, 1950, and that this Court decree that the defendant Thomas B. Mack has no right, title or interest in said sum to be paid to the plaintiff.

3. That defendant Standard Accident Insurance Company be required to pay to plaintiff her costs of suit incurred in action #36005 above mentioned.

4. For her costs of suit incurred herein and for such other and further relief as to the Court may seem just in the premises.

/s/ NEIL D. HEILY,

Attorney for Plaintiff. [21]

State of California,
County of Ventura—ss.

Neil D. Heily, being sworn, says: That he is an attorney at law admitted to practice before all courts of the State of California and has his office in Oxnard, Ventura County, California, and is the attorney for plaintiff in the above-entitled action; that plaintiff is unable to make the verification because she is absent from said County and for that reason affiant makes this verification on plaintiff's

behalf; that he has read the foregoing Complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated upon his information or belief; and as to those matters that he believes it to be true.

/s/ NEIL D. HEILY,

Subscribed and Sworn to before me this 15th day of September, 1950.

[Seal] /s H. F. ROSENMUND,

Notary Public in and for said
County and State.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 23, 1950. [22]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN

Comes Now the defendant, Standard Accident Insurance Company of Detroit, Michigan, a corporation, and for itself alone, and for none of its co-defendants, and answers plaintiff's complaint herein as follows:

First Defense

I.

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

I.

Admits the allegations contained in paragraphs I, II, III, V, and VI.

II.

Defendant is without knowledge or information sufficient [24] to form a belief as to the truth of the allegations contained in paragraph IV.

III.

Answering paragraph VII, defendant admits that at the time of said accident there was in effect the policy of insurance therein described, copy of which policy is attached hereto, marked Exhibit "A" and made a part hereof. Except as specifically provided in said policy, defendant denies the allegations in said paragraph as to the terms and conditions thereof.

IV.

Denies each and all of the allegations contained in paragraph VIII.

V.

Answering paragraph IX defendant admits that it has refused to pay the amount therein mentioned or any other sum and admits that said judgments remain unsatisfied. Defendant is without knowl-

edge or information sufficient to form a belief as to the truth of the allegation that Billy Towry has no assets except said policy. Defendant denies each and all of the remaining allegations contained in said paragraph and denies that it is obligated to pay the amounts mentioned therein or any other sum.

VI.

Answering paragraph X, defendant admits the allegations as to the amount of said judgments but denies each and all of the remaining allegations contained in said paragraph.

VII.

Answering paragraph XI, defendant admits that the defendant, Mack, has made claim upon this defendant for the sum therein mentioned but denies that it is obligated to pay the sums mentioned in said paragraph or any other sums.

VIII.

Denies each and all of the allegations contained in [25] paragraph XII.

As a Third and Affirmative Defense Defendant Alleges

I.

That the policy of insurance described in plaintiff's complaint, copy of which is attached hereto and made a part hereof and marked Exhibit "A," expressly provided as a condition thereof that said Billy Towry, would cooperate with this defendant

and assist defendant in securing and giving evidence.

II.

Dispite said express condition contained in said policy the said Billy Towry failed, neglected, and refused to cooperate with this defendant and failed, neglected, and refused to assist in securing and giving evidence but on the contrary concealed evidence from this defendant and made false and untruthful statements both to this defendant and in a sworn deposition intended for use upon the trial of said actions in the state court.

Wherefore, defendant prays that plaintiff take nothing by her action herein; and that defendant have judgment for its costs.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,

Attorneys for Defendant, Standard Accident Insurance Company.

Insurance policy was made Winget's Exh. 4, at trial.

EME.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 2, 1950. [26]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
THOMAS B. MACK

Comes Now Defendant Thomas B. Mack, above named, and severing himself from his co-defendants, and for himself alone, in answer to plaintiff's complaint on file herein, denies, admits and alleges as follows:

I.

This answering defendant admits the allegations of Paragraphs I, II, III, V, VI, VIII, IX and XI of said complaint.

II.

In answer to Paragraph IV of said complaint, this answering defendant has no information or belief sufficient to enable him to answer to said paragraph and the allegations thereof, and basing his denial upon that ground, said defendant denies generally and specifically each and every allegation in said paragraph contained, [28] and the whole thereof.

II.

In answer to Paragraph VII of said complaint, this answering defendant admits said paragraph and the allegations therein contained; and in further answer to said paragraph and allegations, this answering defendant alleges that the policy of automobile bodily injury liability insurance No. J894065 issued by defendant Standard Accident Insurance Company, and referred to in said para-

graph, further contained a limitation of liability of Ten Thousand Dollars (\$10,000.00) for each person.

III.

In answer to Paragraph X of said complaint, this answering defendant denies generally and specifically each and every allegation therein contained, and the whole thereof, save and except that this answering defendant admits that the total amount of said two judgments in said complaint referred to is Forty-seven Thousand Dollars (\$47,000.00), and that the Thirty-two Thousand Dollar (\$32,000.00) judgment on behalf of plaintiff is 68.0851% of said Forty-seven Thousand Dollars (\$47,000.00). Further answering said paragraph and the allegations thereof, this answering defendant denies specifically that plaintiff is entitled to Thirteen Thousand Six Hundred Seventeen and 02/100 Dollars (\$13,617.02), or any other sum, under or by virtue of said judgment on her behalf, save and except the sum of Ten Thousand Dollars (\$10,000.00), from the principal sum of Twenty Thousand Dollars (\$20,000.00) which defendant Standard Accident Insurance Company is obligated to pay under the terms of the policy in said complaint described.

IV.

In answer to Paragraph XII of said complaint, this answering defendant has no information or belief sufficient to enable him to answer to said paragraph or the allegations thereof, and [29] basing his denial on such ground, denies generally

and specifically each and every allegation in said paragraph contained, and the whole thereof; save and except that this answering defendant admits that defendant Standard Accident Insurance Company should be required to pay into court the total sum of Twenty Thousand Dollars (\$20,000.00) due on said policy, together with interest at 7% per annum from the 30th day of March, 1950, and the costs of plaintiff and this answering defendant described in said two judgments. Further answering said paragraph and the allegations thereof, this answering defendant alleges that plaintiff and this answering defendant are each entitled to the sum of Ten Thousand Dollars (\$10,000.00) from said principal sum of Twenty Thousand Dollars (\$20,000.00).

Wherefore this answering defendant prays:

1. That defendant Standard Accident Insurance Company be ordered to pay into court the principal sum of Twenty Thousand Dollars (\$20,000.00) due under the terms of said policy, together with interest thereon at the rate of 7% per annum from the 30th day of March, 1950, and that thereupon, out of said proceeds so paid into court, this court award to this answering defendant the sum of Ten Thousand Dollars (\$10,000.00), together with interest thereon at the rate of 7% per annum from the 30th day of March, 1950, and that this court decree that plaintiff has no right, title or interest in said sum to be paid to this answering defendant.

2. That defendant Standard Accident Insurance Company be required to pay to this answering defendant his costs of suit incurred in action No. 35511 in said complaint referred to.

3. For his costs of suit herein incurred.

4. For such other and further relief as to the court may seem just in the premises.

JAMES C. HOLLINGSWORTH,

EDWARD HENDERSON,

By /s/ EDWARD HENDERSON,

Attorneys for Defendant,

Thomas B. Mack.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 14, 1950. [30]

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM

PRIOR TO TRIAL

Pursuant to the provisions of Rule 12, U. S. District Court Rules, this memorandum is submitted for purposes of the trial set for March 26, 1951. That rule requires a brief statement of the facts of the case, all admissions and stipulations and a summary of the points of law involved with authorities. There are no stipulations on file pertinent to the trial, and this memorandum will be limited

therefore to statement of the facts, admissions and authorities.

Statement of Facts and Admissions

Vivian Winget, the plaintiff in this case, formerly Vivian Lee DeLozier, on the 31st day of March, 1950, recovered a judgment in the Superior Court of the State of California in and for the County of Ventura against one Billie Ray Towry for the sum of Thirty-two Thousand and no/100 (\$32,000.00) Dollars with interest thereon [33] at seven (7) per cent per annum from the 30th day of March, 1950, together with costs of suit. The action was prosecuted upon a complaint which alleged generally that the plaintiff was riding as a guest in the vehicle of Towry and that, in one cause of action, said Towry was guilty of willful misconduct in the driving of his vehicle and, in a second cause of action, that Towry was driving while under the influence of intoxicating liquor. In the course of the trial of the case, the plaintiff moved to dismiss this second cause of action but, over the protests of counsel for the defendant Towry against such dismissal, the Court denied plaintiff's motion to dismiss the same.

In the same automobile accident, the defendant in this case, Thomas B. Mack, was injured and he filed a complaint for damages in the Superior Court of Ventura County also and his case and the case of the plaintiff were consolidated for trial. At the same time that plaintiff recovered judgment for Thirty-two Thousand and no/100 (\$32,000.00) Dol-

lars as above set forth, said Thomas B. Mack recovered a judgment for Fifteen Thousand and no/100 (\$15,000.00) Dollars with interest and costs.

At the time of the aforementioned accident, the said Towry had a policy of public liability insurance in force with the defendant in this case, Standard Accident Insurance Company, with limits of liability of Ten Thousand and no/100 (\$10,000.00) Dollars for each person and Twenty Thousand and no/100 (\$20,000.00) Dollars for each accident. A copy of such policy is attached to the answer of the defendant Standard Accident Insurance Company in this case.

Plaintiff in this case originally brought this action in the Superior Court of Ventura County, California, upon the theory that she is entitled to a pro rata share of the total judgments totaling Forty-seven Thousand and no/100 (\$47,000.00) Dollars, entitled to recover such pro rata share out of the Twenty Thousand and no/100 (\$20,000.00) Dollars limit of liability under said policy. At [34] the instance of defendant Standard Accident, the case was removed to this Court from the State Court. Both defendant Standard Accident and defendant Mack have admitted the allegations of the complaint numbered I, II, III, V and VI. Those paragraphs allege generally the identity of plaintiff and said two defendants, the fact that judgments were recovered on behalf of plaintiff and the defendant Mack as above set forth, and that said judgments were recovered by reason of the automobile accident above mentioned. Both of said

defendants admit that the policy above mentioned was in force and allege that it contained a provision limiting liability of the insurance company to Ten Thousand and no/100 (\$10,000.00) Dollars for each person and Twenty Thousand and no/100 (\$20,000.00) Dollars for each accident as more fully set forth in the policy. The defendant Mack admits that the assured Towry complied with all the provisions and conditions of the policy and that the policy was and continues to be since the 31st day of March, 1950, in full force and effect. The defendant Standard Accident denies this allegation.

The defendant Mack admits that Standard Accident is obligated to pay Twenty Thousand and no/100 (\$20,000.00) Dollars together with interest and costs under the terms of said policy and that Standard Accident has refused to pay such sum or any portion thereof. Standard Accident admits such refusal and that the judgments are unsatisfied, but denies that it is obligated to pay anything under the terms of said policy.

Both defendants deny that plaintiff is entitled to recover the sum of Thirteen Thousand Six Hundred Seventeen and 02/100 (\$13,617.02) Dollars out of the proceeds of said policy as the plaintiff's pro rata share thereof and the defendant Standard Accident denies that plaintiff is entitled to recover anything and the defendant Mack alleges plaintiff is entitled to recover only the sum of Ten Thousand and no/100 (\$10,000.00) Dollars out of said policy.

Both defendants admit that the defendant Mack claims he is [35] entitled to Ten Thousand and

no/100 (\$10,000.00) Dollars out of the proceeds of said policy.

In the prayer of his answer, the defendant Mack asks judgment that Twenty Thousand on no/100 (\$20,000.00) Dollars be paid into Court by the defendant Standard Accident together with interest and costs and that the defendant Mack get Ten Thousand and no/100 (\$10,000.00) Dollars of this amount plus interest and costs.

The defendant Standard Accident alleges as an affirmative defense that Towry, the assured, failed to cooperate as required by the policy and concealed evidence and made false and untrue statements to Standard Accident before the trial in Ventura Superior Court.

This leaves two main issues in the case, namely, did Towry cooperate with the insurance company within the meaning of the policy or did he not so that the insurance company can escape liability and secondly, is the plaintiff entitled to a pro rata share out of anything found due under the terms of the policy. [36]

Respectfully submitted,

/s/ NEIL D. HEILY,

Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 20, 1951. [44]

[Title of District Court and Cause.]

**DEFENDANT'S MEMORANDUM PURSUANT
TO LOCAL RULE 12**

No. 12642-M

Statement of Facts

Each of the plaintiffs in the above cases consolidated for trial herein recovered a judgment in the Superior Court of the State of California, in and for the County of Ventura, against one Billy Ray Towry. The State Court actions had been consolidated for trial. These judgments were in favor of plaintiff Winget in the sum of Thirty-two Thousand Dollars (\$32,000.00), and plaintiff Mack in the sum of Fifteen Thousand Dollars (\$15,000.00), and were entered on or about March 31, 1950. [46]

At the time of the accident giving rise to the above actions, the said Towry was insured under a policy of automobile public liability insurance issued by this defendant and pertaining to the automobile then operated by him. A copy of said policy is attached to the answer of this defendant herein to the Winget complaint and to the complaint filed herein by plaintiff Mack.

This defendant by affirmative defense in each case alleges that the assured Towry, contrary to an express condition contained in his said policy, failed, neglected, and refused to assist in securing and giving evidence, and on the contrary, concealed evidence from this defendant and made false and untruthful statements to this defendant and in a sworn deposition intended for use upon the trial of said actions in the State Court.

Issues Raised by the Pleadings

The issues raised by the pleadings herein are:

1. Whether the insured Towry breached the conditions of his policy as to cooperation so as to prevent any recovery upon said policy for the accident in question, and

2. In the event the first issue should be decided in the negative, whether the plaintiff Winget must be limited to a recovery of the maximum sum of Ten Thousand Dollars (\$10,000.00), plus interest and costs.

Admissions and Stipulations

In the statement of facts above are embraced in general the matters alleged in the complaints admitted by this defendant. No written stipulation as to other evidentiary matter has been made. [47]

Respectfully submitted,

FULCHER & WYNN,

By /s/ CAROL G. WYNN,

Attorneys for Standard Accident Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 21, 1951. [48]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find in favor of the plaintiff, Vivian Winget, and against the defendant, Standard Accident Insurance Company of Detroit, Michigan.

/s/ ROBERT J. BERNARD,
Foreman of the Jury.

Dated March 29, 1951, Los Angeles, California.

[Endorsed]: Filed March 29, 1951. [50]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for trial before a jury in the above-entitled Court on the 27th day of March, 1951, Neil D. Heily appearing as attorney for plaintiff; Fulcher & Wynn, by Carol Wynn, appearing as attorneys for defendant Standard Accident Insurance Company of Detroit, Michigan (hereinafter referred to as "defendant Standard Accident"), and James C. Hollingsworth and Edward Henderson appearing as attorneys for Thomas B. Mack (hereinafter referred to as "defendant Mack"), the action having been dismissed as to the fictitious defendants and, in the course of the trial of said cause on the 27th day of March, 1951, the

defendant Mack and the defendant Standard Accident having entered into a stipulation for judgment in the sum of Six Thousand and no/100 (\$6,000.00) Dollars in favor of defendant Mack and against defendant Standard Accident and the Court having approved such stipulation for entry of such judgment over the objection by counsel for the plaintiff, the defendant Mack thereupon [51] withdrew from further participation as a party in the trial of said cause and the trial of said cause having proceeded with only the plaintiff and the defendant Standard Accident as parties therein and the jury having returned a verdict on the only issue submitted to it, to wit, the issue as to whether the assured in the policy hereinafter referred to had cooperated with the defendant Standard Accident, the insuring company, under the terms of said policy, and said verdict having been in favor of the plaintiff and against the defendant Standard Accident, the Court now makes its findings of fact and conclusions of law with reference to the issues not so submitted to said jury as follows:

Findings of Fact

I.

The Court finds that the defendant Standard Accident has admitted the allegations contained in Paragraphs I, II, III, V and VI of the complaint on file herein and therefore that said allegations are true.

II.

The Court further finds that at the time and

place of the accident referred to in the admitted paragraphs of the complaint on file herein as hereinabove specified there was in full force and effect a certain automobile bodily injury liability policy No. J894065 issued by the defendant Standard Accident to one Billy Ray Towry, also known as Billy Towry, under the terms of which policy the defendant Standard Accident agreed to pay on behalf of said Billy Towry all sums which he might become obligated to pay by reason of liability imposed upon him by law for damages because of bodily injury sustained by any person or persons caused by accident and arising out of the ownership, maintenance or use of the vehicle involved in said accident up to the limit of Twenty Thousand and no/100 (\$20,000.00) Dollars for such accident, said policy being what is known as a 10-20 policy, that is, having as a coverage for bodily injury liability Ten [52] Thousand and no/100 (\$10,000.00) Dollars for each person and Twenty Thousand and no/100 (\$20,000.00) Dollars for each accident.

III.

That under condition No. 8 of said policy it was provided therein as follows:

“The insured shall cooperate with the company and, upon the company’s request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make

any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.”

That the issue as to whether said Billy Towry had cooperated with the defendant Standard Accident under the provisions of said clause in said policy was submitted to the jury in the above-entitled cause and the jury determined that said Billy Towry had cooperated with the defendant Standard Accident as required by said clause by finding in favor of the plaintiff and against the defendant Standard Accident.

IV.

That said policy of insurance was in full force and effect and had been complied with by the assured Billy Towry at the time of the rendition of the judgment referred to in the admitted paragraphs of the complaint on file herein as hereinabove specified, and that under the terms of said policy the defendant Standard Accident agreed to pay the total sum of Twenty Thousand and no/100 (\$20,000.00) Dollars damages arising out of bodily injury sustained by two or more persons in such accident and in partial satisfaction of the judgment in favor of the plaintiff in the sum of Thirty-two Thousand and no/100 (\$32,000.00) Dollars and in partial satisfaction of the judgment in [53] favor of the defendant Mack in the sum of Fifteen Thousand and no/100 (\$15,000.00) Dollars.

V.

That Paragraph I of the "Conditions" of said policy reads as follows:

"The limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to 'each accident' is, subject to the above provisions respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident."

VI.

That in the course of the trial of said cause, the Court granted the motion of the plaintiff to amend her complaint to conform to the proof by inserting therein a prayer for interest at seven (7) per cent per annum from the 30th day of March, 1950, on the total sum of Thirty-two Thousand and no/100 (\$32,000.00) Dollars, the principal sum of the judgment obtained by said plaintiff against said Billy Towry. That Paragraph II of the "insuring agreements" contained in said policy reads as follows:

"As respects such insurance as is afforded

by the other terms of this policy under coverage A the company shall [54]

“(a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

“(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of the policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

“(c) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

“The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to

the applicable limit of [55] liability of this policy."

VII.

That all allegations in the pleadings on file herein inconsistent with the foregoing are untrue.

Conclusions of Law

From the foregoing findings of fact, the Court concludes that the plaintiff is entitled to judgment against the defendant Standard Accident in the sum of Ten Thousand and no/100 (\$10,000.00) Dollars plus costs in State Court of \$97.80, together with interest on the whole sum of \$10,097.80 at the rate of seven (7) per cent per annum from the 30th day of March, 1950, and her costs of suit, and that plaintiff is not entitled to a pro rata share of the total sum of Twenty Thousand and no/100 (\$20,000.00) Dollars payable under said policy of insurance and is not entitled to interest on the total sum of Thirty-two Thousand and no/100 (\$32,000.00) Dollars, the amount of her judgment against the said Billy Towry, but is only entitled to interest on the said sum of Ten Thousand and no/100 (\$10,000.00) Dollars as above set forth.

Let judgment be entered accordingly.

Dated this 30th day of April, 1951.

/s/ HARRY C. WESTOVER,
Judge.

Judgment entered May 2, 1951.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 1, 1951. [56]

In the District Court of the United States, Southern District of California, Central Division

No. 12327-HW

VIVIAN WINGET,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, a Corporation; THOMAS B. MACK, etc.,
Defendants.

JUDGMENT

The above-entitled action came on for trial on the 27th day of March, 1951, in the above-entitled Court before a jury, Neil D. Heily appearing as attorney for plaintiff; Fulcher & Wynn, by Carol Wynn, appearing as attorneys for defendant Standard Accident Insurance Company of Detroit, and James C. Hollingsworth and Edward Henderson appearing as attorneys for defendant Thomas B. Mack and, in the course of the trial of said cause, the defendant Mack and the defendant Standard Accident having entered into a stipulation for a judgment in favor of the defendant Mack in the sum of Six Thousand and no/100 (\$6,000.00) Dollars and against the defendant Standard Accident and the defendant Mack having thereupon withdrawn from further trial in the case as a party thereto and trial having proceeded with plaintiff and defendant Standard Accident as the only parties, and

the jury having rendered a verdict in favor of the plaintiff and against the [58] defendant Standard Accident on the only issue submitted to it and the Court having made its findings of fact and conclusions of law herein as to the legal issues involved in the case,

It Is Hereby Ordered, Adjudged and Decreed, that the plaintiff do have and recover judgment against the defendant Standard Accident Insurance Company of Detroit in the sum of Ten Thousand Ninety-seven and eighty/100 (\$10,097.80) Dollars together with interest thereon at the rate of seven (7) per cent per annum from the 30th day of March, 1950, and together with plaintiff's costs incurred and hereby fixed at the sum of \$131.85.

Dated this 30th day of April, 1951.

/s/ HARRY C. WESTOVER,
Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 1, 1951. [59]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above-Entitled Court and to the Clerk Thereof; to the Plaintiff Vivian Winget, and to Neil D. Heily, Her Attorney; and to the Defendant Thomas B. Mack, and to Edward Henderson and James C. Hollingsworth, His Attorneys:

Notice Is Hereby Given that Standard Accident Insurance Company of Detroit, Michigan, a corporation, one of the defendants above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on May 2, 1951, in Book 72 of Judgments, at page 285 thereof, and from the whole of said judgment.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,
Attorneys for Defendant Standard Accident Insurance Company.

[Endorsed]: Filed May 29, 1951. [61]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM
PART OF JUDGMENT

To the Clerk of the Above-Entitled Court, Defendants Standard Accident Insurance Company of Detroit, and Fulcher & Wynn, Their Attorneys, and Defendant Thomas B. Mack and James C. Hollingsworth & Edward Henderson, His Attorneys:

You and each of you will please take notice that the above-named plaintiff Vivian Winget appeals to the United States Court of Appeals for the Ninth Circuit from the following part of that certain judgment rendered in the above-entitled Court in

the above-entitled cause on the 2nd day of May, 1951, in favor of the above-named plaintiff Vivian Winget and against the above-named defendant Standard Accident Insurance Company of Detroit, to wit: That portion of said judgment which fails to award to said plaintiff the sum of Three Thousand Six Hundred Seventeen and 02/100 (\$3,617.02) Dollars in addition to the sum of Ten Thousand Ninety-seven and 80/100 (\$10,097.80) Dollars awarded by said judgment; and from that portion of said judgment which fails to award to said plaintiff interest at seven (7) per cent per annum from the 30th day of March, 1950, on the sum of Twenty-two Thousand and no/100 (\$22,000.00) Dollars. [62]

Dated this 29th day of May, 1951.

/s/ NEIL D. HEILY,
Attorney for Plaintiff,
Vivian Winget.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 31, 1951. [63]

In the United States District Court, Southern
District of California, Central Division

Honorable Harry C. Westover, Judge Presiding

No. 12327-HW

VIVIAN WINGET,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COM-
PANY OF DETROIT, MICHIGAN, a Cor-
poration, THOMAS B. MACK, et al.,
Defendants.

No. 12642-HW

THOMAS B. MACK,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COM-
PANY OF DETROIT, MICHIGAN, a Cor-
poration, et al.,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff Vivian Winget:

NEIL D. HEILY, ESQ.

For Plaintiff and Defendant Mack:

JAMES C. HOLLINGSWORTH, ESQ.,
EDWARD HENDERSON, ESQ.

For the Defendant Standard Accident Insurance Company:

FULCHER & WYNN, by
CAROL G. WYNN, ESQ.

March 27, 1951—10:00 A.M.

The Clerk: Consolidated cases, Nos. 12327-HW and 12642-HW, Vivian Winget vs. Standard Accident Insurance Company of Detroit, Michigan, a corporation, et al., and Thomas B. Mack vs. Standard Accident Insurance Company, a corporation, et al., for consolidated jury trial.

Mr. Heily: Ready for the plaintiff Winget.

Mr. Hollingsworth: Ready for the plaintiff Mack.

Mr. Wynn: Ready for the defendant.

The Court: You may proceed.

(A jury was duly impaneled.)

The Court: Would you like to make an opening statement?

Mr. Heily: I believe in the interest of chronology and keeping the jurors from being confused, it would be best.

The Court: All right, you can make a statement.

(Opening statement of Mr. Heily.)

(Opening statement of Mr. Hollingsworth.)

(Opening statement of Mr. Wynn.)

The Court: Call your first witness.

Mr. Heily: If the court please, counsel for the defense and plaintiffs have been discussing the matter of the burden of proof of non-cooperation. I believe it will be stipulated that the burden of proof is upon the defendant [4*] Standard Accident Insurance Company to show non-cooperation. Therefore, in order to shorten these proceedings as much as possible, the fact that the judgments were entered for \$15,000 in favor of Mack, the fact that the judgment was entered in favor of the plaintiff Winget for \$32,000 is admitted in the pleadings. For the purpose of getting it to the jury, I believe it will be stipulated that those two judgments were entered March 30, 1950, in favor of those two plaintiffs and against the defendant Towery. Is it so stipulated?

Mr. Wynn: We so stipulate.

The Court: Such may be the stipulation.

Mr. Heily: Will you instruct the jury now, your Honor, that is a matter to be taken as evidence? Then the plaintiffs will rest.

The Court: Ladies and gentlemen of the jury, during the trial of this case if the parties stipulate as to a fact, you can accept that stipulation the same as if the witnesses appeared here and testified to it. There is no controversy in this case, evidently,

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

of the fact that a judgment was rendered in favor of the plaintiffs, there is no controversy about the judgment. The only issue in this case, evidently, seems to be the question of whether or not the insurance company is liable.

Mr. Hollingsworth: In the case of the plaintiff, Thomas [5] B. Mack, the general stipulation will apply. I have here an exemplified copy of the judgment in the State Court and I presume there will be no objection to offering it and having it received in evidence on behalf of the plaintiff Thomas B. Mack.

Mr. Wynn: No objection.

The Court: It may be received.

The Clerk: Plaintiff Mack's Exhibit No. 1.

(The document referred to was received in evidence and marked Plaintiff Mack's Exhibit No. 1.)

The Court: I assume that the burden of proof is now on the defendant in this case.

Mr. Wynn: There are several preliminary matters, if the court please. We have under subpoena present in the courtroom Miss Kay Dawson, notary public and official reporter in the County of Ventura, who is prepared to testify as to a transcript I hold of questions and answers taken before her on February 28, I believe it was, 1950. Counsel have examined this statement, and I think are prepared to stipulate she would so testify if called, so that I may introduce the transcript in evidence at the proper time.

The Court: Is there any objection to the introduction of the transcript?

Mr. Hollingsworth: No, your Honor. We know Miss Dawson and we have no objection to it. [6]

The Court: It may be introduced now, if you want, and it may be marked as Exhibit A.

Mr. Heily: I have no objection. However, I would like to ask the witness Miss Dawson a few questions regarding the place and time of taking.

Mr. Wynn: My only purpose was to permit her to leave.

The Court: The transcript may be introduced and marked Defendant's Exhibit A.

The Clerk: So marked.

(The document referred to was received in evidence and marked Defendant's Exhibit A.)

The Court: Now, if you want the witness to be excused, I assume you should allow her to be placed upon the stand so she can be questioned and then she can be excused. Otherwise you will have to keep her here until some time later.

Mr. Wynn: One other preliminary matter, if the court please. Also under subpoena is Walter J. Fourt, who is now a Superior Court judge of Ventura County. Judge Fourt called me after being served with the subpoena and explained that it would be extremely embarrassing to the Superior Court of Ventura were he to spend a day or so in Los Angeles, and I suggested conferring with my good friends, counsel for the plaintiffs, and the submission by Judge Fourt of a statement as

to what his testimony would be if called. I hold that affidavit and I understand counsel is willing to stipulate that it may [7] be introduced in evidence as the testimony of Judge Fourt.

Mr. Hollingsworth: No objection.

Mr. Heily: No objection.

The Court: And read to the jury?

Mr. Wynn: And read to the jury.

The Court: Such may be the order. It may be marked as Exhibit B.

The Clerk: So marked.

(The document referred to was received in evidence and marked Defendant's Exhibit B.)

Mr. Wynn: Miss Dawson.

KAY H. DAWSON

called as a witness on behalf of the defendant Standard Accident Insurance Company, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please, and state your name.

The Witness: Kay H. Dawson.

The Court: Miss Dawson, I am going to ask you to speak louder so the jury can hear you, and the lawyers, too.

The Witness: All right, your Honor.

Direct Examination

By Mr. Wynn:

Q. Miss Dawson, if you can make me hear back

(Testimony of Kay H. Dawson.)

here, I [8] am sure every person on the jury can hear. What is your business or occupation?

A. Public stenographer and notary public.

Q. How long have you been so engaged?

A. About seven and one-half years.

Q. In the City of Ventura, California?

A. Yes.

Q. During that period of time? A. Yes.

Q. Directing your attention to February 28, 1950, did you have occasion on that date to take a written statement of a Billy Ray Towery?

A. I did.

Q. Where was that statement taken?

A. In the court reporter's office at the Court House, Ventura.

Q. Who was present at that time?

A. Mr. Ellerby, Mr. Towery, and myself.

Q. Prior to the statement from Mr. Towery, was he sworn by you? A. I believe so.

Q. At that time were certain questions asked him by Mr. Ellerby? A. That's right.

Q. And certain answers given by him? [9]

A. That is correct.

Q. Did you report in shorthand or otherwise in notes the questions asked and the answers given?

A. I did.

Q. Subsequently, did you transcribe from those notes a writing? A. I did.

Q. I show you Defendant's Exhibit A, which has been admitted in evidence, and ask you if this is the transcript of your notes taken at the time?

(Testimony of Kay H. Dawson.)

A. It is.

Q. The last page bears a signature, Kay Dawson, does it?

A. That is correct, and that is my notary seal.

Mr. Wynn: May I have permission to read this document to the jury?

The Court: Yes.

Mr. Wynn: I am reading Defendant's Exhibit A, which has been admitted in this cause. It is entitled Reporting of Deposition of Billy Ray Towery, February 28, 1950, Ventura, California. Re Accident January 26, 1949, Vivian Lee Delozier, et al., vs. Thomas B. Mack, vs. Billy Ray Towery.

Appearing on the first sheet is also H. T. Ellerby, Claims Supervisor, Cass & Johansing, Automobile Club of Southern California, 2601 South Figueroa Street, Los [10] Angeles, California. Reported by: Kay Dawson.

Mr. Hollingsworth: May it please the court, before Mr. Wynn reads the deposition or statement, whatever you call it, to the jury and the court, we desire on behalf of Thomas B. Mack to interpose an objection to this particular statement upon the ground that insofar as the plaintiff Thomas B. Mack is concerned, it is purely irrelevant and immaterial, because we tendered no issue in the case of Mack against Towery as to the question of intoxication, and insofar as he is concerned, it has no bearing upon the merits of this case whatsoever. We object to it on the ground it is irrelevant and immaterial insofar as Thomas B. Mack is concerned.

(Testimony of Kay H. Dawson.)

The Court: Overruled.

Mr. Wynn: "Sworn statement of Billy Ray Towery. Witness sworn by notary, Kay Dawson.

"Q. You are Billy Ray Towery?

"A. Yes, sir.

"Q. Do you recall that on October 28, 1949, your deposition was taken in the case of Vivian Lee Delozier, et al., vs. Thomas B. Mack, vs. Billy Ray Towry, by Mr. Hollingsworth and Mr. Heily—do you remember that?

"A. Yes.

"Q. And that deposition was taken in connection with two law suits that arise out of an [11] accident? A. Yes.

"Q. That accident occurred on January 26, 1949—is that right? A. Yes, sir.

"Q. Do you remember that the date of the accident occurred on January 26, 1949?

"A. Yes, sir, that is the date.

"Q. In any event that was the accident in which Delozier and Mr. Mack were injured while riding in your automobile?

"A. Yes, that is the date.

"Q. Mr. Hollingsworth asked you at that time, the following question: 'Did you drink on that day' meaning January 26, 1949, the date of the accident. You answered 'No.' Is that true or false? Is that answer correct?

"A. No, the answer is false. I did have something to drink that day.

"Q. He then asked you this question: 'Did

(Testimony of Kay H. Dawson.)

you drink anything on that day' and the answer was 'No.' Is that answer true or false?

"A. The answer is false. I did drink on that day.

"Q. I assume the next question was 'all [12] day long' and you answered 'All day long.' Was your answer true or false?

"A. Well, sir, all day long. I had an occasional beer.

"Q. The next question is: He asked, 'Any intoxicating liquor' and you answered 'No.' Is that true or false? A. False.

"Q. The next question 'Of any kind?' And you answered 'No.' Is that answer true or false? A. False.

"Q. Then the next question: 'You didn't stop at any place where they sell it' and your answer was 'No.' Is that true or false?

"A. That day I did. Yes, I stopped at a place that sold it.

"Q. Then the question: 'You didn't go into any bar room?' And your answer was 'No.' Was that true or false? A. False.

"Q. Then the question: 'Or any cocktail bar?' And your answer is 'No.' Was that true or false? A. False.

"Q. Question: 'You didn't have any [13] liquor in your possession?' And your answer was 'No.' Is that true or false?

"A. I did have liquor in my possession.

(Testimony of Kay H. Dawson.)

“Q. Then the next question was: ‘On your person? And you answered ‘No.’ Was that true or false? A. I had beer.

“Q. Then the next question was: ‘You didn’t take anything to drink all day long?’ And your answer was: ‘No.’ Is that true or false?

“A. False.

“Q. Then the next question: ‘What time of day did this accident happen?’ Your answer was: ‘The accident happened about 5 that afternoon, I guess.’ Was that true or false?

“A. False to the best of my knowledge.

“Q. Question: ‘Did you have any beer that day?’ Your answer: ‘No.’ Was that true or false? A. False.

“Q. Then his next question: ‘Or any other intoxicants of any kind?’ You answered ‘No.’ Was that true or false? A. True.

“Q. All you had that day was beer—is that [14] right? A. Yes, sir.

“Mr. Ellerby: Then Mr. Heily asked you the following questions:

“Q. Did you go anywhere else than just to the home at the beach?”

(Forget that one) to reporter.

“Q. Question: ‘Did you at any time that day go into the U & I Cafe?’ Your answer was ‘No.’ Is that true or false? A. False.

“Q. Then the next question. ‘Did you at any time have a drink of beer?’ The answer by you was ‘No.’ Is that true or false?

(Testimony of Kay H. Dawson.)

“A. False.

“Q. The next question: ‘Did you at any time that day go to Zeilger’s Cafe?’ Your answer was ‘No.’ Was that true or false?

“A. False.

“Q. Question: ‘Did you have a glass of beer in Zeilger’s Cafe that day?’ Your answer was ‘no.’ Was that true or false? A. False.

“Q. That is all.”

The Court: I wonder if for the purpose of the record [15] we could have a stipulation. When was the date of the original deposition?

Mr. Wynn: October 28, 1949.

Mr. Heily: Yes, that is correct.

The Court: October 28, 1949?

Mr. Heily: October 28.

The Court: What is the date of that statement?

Mr. Wynn: February 28, 1950.

The Court: February what?

Mr. Wynn: February 28, 1950.

The Court: And what was the date of trial?

Mr. Hollingsworth: I am quite sure, your Honor, it started on the 28th of March and finished on the 30th. The judgment was rendered on the 30th, as appears from Plaintiff Mack’s Exhibit 1. I am sure it started on the 28th of March, subject to correction. That date might be subject to correction. But I am quite sure it took three days to try.

Mr. Wynn: The Superior Court files of Ventura County are under subpoena and here in the courtroom.

(Testimony of Kay H. Dawson.)

The Court: That's all right. We can change it if necessary.

Mr. Hollingsworth: Either the 27th or the 28th, your Honor.

The Court: These dates may be important and I want to be sure there will be no question. It can be stipulated that [16] the original deposition was taken on or about October 28, 1949, and the statement that was just read was taken on or about February 28, 1950, and the trial commenced on or about March 28, 1950.

Mr. Hollingsworth: I would say March 27, your Honor.

The Court: March 27th?

Mr. Hollingsworth: Yes. I think the motion was made the week before in the trial court, and the case started a week later. I think we started on Monday, March 27th.

Mr. Wynn: No further questions of this witness.

Cross-Examination

By Mr. Heily:

Q. Miss Dawson, at whose request did you take this statement?

A. I had a call from the office of the court reporter. All the reporters were busy in court.

Q. Who paid you for your services?

A. Mr. Ellerby of Cass & Johansing.

Q. The insurance agent?

A. I think he is the claims supervisor.

(Testimony of Kay H. Dawson.)

Q. He was the one who talked to you to get you to come up to the court reporter's office?

A. No. I had a call from the office itself. Whether it was Mr. Van Vleck, I don't remember. [17]

Q. In any event, you were paid by Cass & Johansing? A. That is correct.

Q. When you arrived at the scene where the statement was to be taken, is that the first time you saw Mr. Towry and Mr. Ellerby?

A. That is correct.

Q. Where were they?

A. They were sitting in the court reporter's office across from a double desk.

Q. You did not go into the room with them? They were there when you arrived?

A. They were there when I arrived.

Q. Were they talking as you entered?

A. I couldn't say for sure, but I believe they were.

Q. No one else was present? A. No.

Q. In the course of the taking of this statement, do you recall anything being said to you by Mr. Ellerby to this effect, "Omit that," or "Leave that off the record," or "This is off the record"?

A. Just that one statement that is in the record.

Q. Just the one statement?

A. Just the one statement.

Q. During the time you were preparing to take the statement, did you hear Mr. Ellerby tell Mr. Towry, "Just say [18] whether the question is true or false. Don't elaborate."

(Testimony of Kay H. Dawson.)

A. I don't recall that, but I do remember that the whole testimony seemed to be either "True" or "False."

Q. In other words, you don't recall Mr. Ellerby saying, "Don't explain your answer. Just answer true or false."

A. No, I don't honestly. That is quite a while ago.

Q. He might have said that and he might not and you wouldn't recall?

A. I wouldn't know, myself.

Mr. Heily: That's all.

Mr. Hollingsworth: We have no questions.

Mr. Wynn: May the witness be excused?

Mr. Hollingsworth: As far as I am concerned, she may.

Mr. Heily: Yes.

The Court: You may be excused.

The Witness: Thank you, your Honor.

(Witness excused.)

The Court: I understand from the testimony that none of the attorneys for the plaintiffs in this action was present at the time this statement was taken.

Mr. Wynn: No, they were not.

Mr. Hollingsworth: That is correct, your Honor. We were not notified and we were not present and knew nothing about it at the time it was taken. [19]

Mr. Wynn: I have subpoenaed and they are here in the courtroom, I understand, the original

files in these actions in the Ventura County Superior Court, which contain the original deposition of Mr. Towry taken on October 28, 1949. I have what appears to be a carbon copy of such a deposition and I think that counsel——

Mr. Hollingsworth: I have got an exemplified copy here, if it will help you out, showing the corrections that were made in detail, and if you want to use that or use yours, I have no objection.

Mr. Wynn: Mr. Hollingsworth has offered this, and I now offer it in evidence.

The Court: It may be received and marked Exhibit C.

The Clerk: So marked.

(The document referred to was received in evidence and marked Defendant's Exhibit C.)

Mr. Hollingsworth: It will be understood, your Honor, I suppose, to protect our record, anything relative to intoxication, as far as Mr. Mack is concerned, goes in over our general objection and it is immaterial and irrelevant.

The Court: You can have a general objection as to intoxication as far as your client is concerned, and there will be the same ruling.

Mr. Wynn: May I have your Honor's permission to read certain portions of this deposition to the jury at this time, [20] which I will specify by page and line?

The Court: If there is no objection, you can read certain portions.

Mr. Hollingsworth: No objection on our part to that method, if he wants to pursue it.

The Court: You may do that, then.

Mr. Wynn: I will read from the deposition of Billy Ray Towry taken in the actions of Vivian Lee Delozier, a minor, by Lawrence E. Delozier, her guardian ad litem, plaintiff, vs. Billy Ray Towry, etc., defendants, and Thomas B. Mack, plaintiff, vs. Billy Ray Towry, etc., defendants, Superior Court of Ventura County, before Cecil Van Vleck, notary public, in the office of James C. Hollingsworth, on the 28th day of October, 1949. Reading from page——

The Court: Maybe before you read, you should stipulate as to who was present. You said it was taken in Mr. Hollingsworth's office. I think you should stipulate who was there.

Mr. Wynn: May it be stipulated counsel present on behalf of the plaintiff Delozier was Mr. Neil D. Heily; present on behalf of the defendant Thomas B. Mack were Edward Henderson and James C. Hollingsworth; present for the defendants were the firm of Bauder, Gilbert, Thompson, Kelly and Veatch, by Wayne Veatch.

Mr. Hollingsworth: It may be so [21] stipulated.

Mr. Heily: So stipulated.

Mr. Wynn: Reading from page 7, beginning on line 11, question asked by Mr. Hollingsworth:

“Q. Did he do any drinking during that interval? A. No.

“Q. Nothing of an intoxicating nature to drink? A. No.

“Q. Neither one of you? A. No.”

Then a question was asked to which an objection was interposed.

Mr. Hollingsworth: What page is this?

Mr. Wynn: Page 7.

Mr. Heily: I think you should continue reading that.

Mr. Wynn: I have no objection.

“Q. Did you drink?

“Mr. Veatch: To which we object as incompetent, irrelevant and immaterial.

“Mr. Hollingsworth: It is purely preliminary.

“Mr. Veatch: I have no objection to your asking whether he drank on this day, but whether he did before or since is entirely irrelevant.

“Mr. Hollingsworth: Well, you have got your [22] objection.

“Mr. Veatch: I was just registering it. He can answer subject to the objection.

“Mr. Hollingsworth: What I want is just the truth.

“Q. Did you drink? A. Yes, I drink.

“Q. Did you drink on that day?

“A. No.”

Then in handwriting appears the following in pen and ink, “except for some beer.”

The Court: Before you proceed, can you stipu-

late as to when that handwriting was written into the deposition?

Mr. Wynn: The affidavit submitted by Judge Fourt, your Honor, fixes the time at which these changes were made and the deposition signed and sworn to as some time in the latter part of March, 1950.

The Court: Does that apply to all the changes that were made in the deposition?

Mr. Hollingsworth: Yes, your Honor. The changes that we think will be evident prove that these depositions were corrected at least a week or longer prior to the commencement of the trial, in the office of the attorneys who were representing Mr. Towry at that time, in addition to the firm of Bauder, Veatch, Kelly, Thompson, etc. I think that it will [23] show that it was at least a week, if not longer, prior to the date of trial that these corrections were made.

The Court: For my information, and the information of the jury, as a general rule, when the deposition is taken, the party comes in before a notary public, is sworn, and gives testimony, which is taken down in shorthand. Subsequent to that time, the shorthand reporter transcribes it. Then that deposition is presented to the party for his signature. At that time, if I understand correctly, the party who is given the deposition can change his answers.

Now, can you tell me or can you stipulate that the changes were made before it was signed, or were they made after it was signed?

Mr. Hollingsworth: Well, we have the attorney who represented Mr. Towry at that time, and I think we can stipulate the corrections were made before it was signed.

Mr. Wynn: I can't so stipulate in that Judge Fourt, on whom I must rely exclusively as the notary before whom it was signed, has advised that the deposition was subscribed and sworn to before him as a notary public in March, 1950. That is significant in that the deposition itself bears the following:

"Subscribed and sworn to before me this....day of...., 1949. Walter J. Fourt."

Judge Fourt states that: "Some time in [24] March, 1950, the exact date of which I do not now remember, Robert R. Willard, a practicing attorney in Ventura, brought a man to my office and introduced him to me as Billie Ray Towry. Mr. Willard stated to me that Billie Ray Towry had made corrections in a deposition and desired to subscribe and swear to the deposition as corrected. Mr. Willard requested that I certify to Mr. Towry's signature and oath. I thereupon witnessed Mr. Towry's subscription of the deposition and took his oath to the deposition, whereupon I affixed my signature and notarial seal.

"This subscription and certificate were made outside of regular office hours and my secretary was not in the office. On notarial matters brought to me by Robert R. Willard at this general period of time dates were ordinarily filled in and completed by Mr. Willard or my secretary. I did not notice

that the day and month of this particular certificate were not filled in or that the year of 1949, as typed, was incorrect. As indicated above, this corrected deposition was subscribed and sworn to before me as a notary public some time in March, 1950.

"That at or about the time of the signing of the said deposition by Billie Ray Towry I stated in substance to him that in my opinion he was doing the proper thing to state the truth of the matter."

The Court: I take it from what you say, that you can't [25] stipulate that the changes in the deposition were made before it was signed.

Mr. Hollingsworth: That is what this affidavit indicates, your Honor, because it says here, "As indicated above, this corrected deposition was subscribed and sworn to before me as a notary public some time in March, 1950." I think it is very plain on its face that it was corrected before it was signed. I think he is bound by his own exhibit.

The Court: If you can't stipulate, you can probably have some evidence presented as to whether or not it was changed before it was signed. Evidently you can't enter into a stipulation.

Mr. Hollingsworth: Apparently not.

Mr. Wynn: No. May I ask the reporter to read the last question and answer from the deposition?

(The record was read by the reporter, as follows: "Q. Did you drink on that day?

"A. No.")

Mr. Wynn: Corrected to read, "No, except for some beer."

“Q. All day long? A. All day long.

“Q. No intoxicating liquor? A. No.”

Corrected to read, “No, except for some [26] beer.”

“Q. Of any kind? A. No.”

Corrected to read, “No, except beer.”

“Q. You didn’t stop any place where they sell it? A. No.”

Corrected to read, “No, except where they sell beer and food in cafes.”

“Q. You didn’t go into any barroom?

“A. No.

“Q. Or cocktail bar? A. No.

“Q. Lounges? A. No.

“Q. You didn’t have any liquor in your session? A. No.”

Corrected to read, “No. No hard liquor. We had two small bottles of beer in the car.”

“Q. You didn’t take a drink all day long?

“A. No.”

Corrected to read, “No. No hard liquor, just some beer.”

“Q. What time did this accident happen?

“A. The accident happened about 5:00 o’clock that afternoon, I guess. [27]

“Q. Had you had any beer that day?

“A. No.”

That is corrected to read, “Yes.”

“Q. Or any other intoxicant of any kind?

“A. No.

“Q. Not a thing? A. No.”

Corrected to read, “No. Except for beer.”

Reading from page 15 of the same deposition, questioning by Mr. Hollingsworth, beginning on line 21:

“Q. Did you do any drinking there?

“A. No.”

Corrected to read, “No. No hard liquor.”

“Q. You didn’t drink any beer?

“A. No.”

Corrected to read, “No. I had one small bottle.” of beer.”

“Q. Nobody else did? A. No.”

Corrected to read, “Yes. Tommy and I drank a small bottle of beer each.”

“Q. Everybody was cold sober?

“A. Yes.

“Q. You didn’t see Mack have anything to drink? A. No.” [28]

Corrected to read, “No, except for the beer I have mentioned.”

“Q. You didn’t take any of any kind?

“A. No.”

Corrected to read, “No. No hard liquor, just beer.”

Then reading from page 21, the examination of Mr. Billy Ray Towry, beginning line 18:

“Q. And your driving was not influenced by anything that you had had to drink?

“A. No.

“Q. Had you been in any cocktail bars before taking that trip that afternoon?

“A. No.”

Shal I call my next witness, your Honor?

The Court: Yes, call the witness.

Mr. Wynn: Mr. Medlen.

JOHN WILLIAM MEDLEN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please, and state your name.

The Witness: John William Medlen. [29]

Direct Examination

By Mr. Wynn:

Q. What is your business, Mr. Medlen?

A. Claims adjuster.

Q. By whom are you employed?

A. Cass & Johansing.

Q. Were you so employed in 1949 and 1950?

A. I was.

Q. What is the address of your place of business?

(Testimony of John William Medlen.)

A. 1301 Santa Barbara Street, Santa Barbara, California.

Q. Are you acquainted with Billy Ray Towry?

A. I am.

Q. Is he present in the courtroom at the present time?

A. He is.

Q. When did you first meet Mr. Towry?

A. I am not certain of the date, but I believe it was approximately two weeks following his accident of January, 1949.

Q. Where did you meet him?

A. I am not certain of that either, but I believe it was in the Auto Club in Ventura.

Q. At the time you first met Mr. Towry, had you been advised by him or on his behalf as to the occurrences of [30] the accident?

A. I was.

Q. How were you advised?

A. By means of a form report that was taken by the Auto Club adjuster in Ventura and it was mailed to me in Santa Barbara.

Q. Did the form report which you received purport to have been signed by Mr. Towry?

A. Yes, it did.

Mr. Heily: Objected to as incompetent, irrelevant and immaterial and not the best evidence.

Mr. Wynn: I am laying the foundation for the evidence, if the court please.

The Court: Let's have the question.

(The question was read by the reporter.)

(Testimony of John William Medlen.)

The Court: Just answer it yes or no.

The Witness: Yes.

Q. (By Mr. Wynn): I show you a printed sheet entitled "Assured's report," bearing typing on both the front and reverse sides, and bearing the signature "Billy R. Towry."

Is this the report to which you have referred?

A. Yes, it is.

Q. Do you know the signature of Mr. Towry?

A. No, I doubt that I could identify it now unless I had this. [31]

Mr. Wynn: We offer this for identification, if the court please.

The Court: It may be received for identification only.

Mr. Wynn: May I ask one further question?

The Court: Yes.

Q. (By Mr. Wynn): Was all of the typing appearing on this document on it when you first received it?

A. To the best of my knowledge, it was.

The Court: That will be marked as Defendant's Exhibit D for identification.

(The document referred to was marked Defendant's Exhibit D for identification.)

Q. (By Mr. Wynn): Did you state that shortly after the receipt of this document marked Defendant's Exhibit D for identification you had a meeting with Mr. Towry?

A. I don't believe it was an arranged meeting.

(Testimony of John William Medlen.)

I happened to be in the Ventura office, and I believe it was at that time he also happened to be in there.

Q. About what date was that?

A. I would say that was approximately two weeks following the accident.

Q. Did you have any conversation with him at that time concerning the accident?

A. To the best of my knowledge, I did. [32]

Q. Was anyone else present?

A. I believe Mr. Fraser was there.

Q. Do you recall what the substance of that conversation was at the present time?

A. Not definitely, but I think it pertained to the medical payments feature of the policy he held.

Q. In any event, during that conversation was any mention made as to whether or not Mr. Towry had or had not been drinking prior to the accident?

A. None, to my recollection.

Q. Did you have occasion to discuss this accident with Mr. Towry subsequently?

A. Yes, I did.

Q. Can you tell us approximately the next time you talked to him?

A. I believe it was in July of 1949.

Q. Where did that conversation take place?

A. At his home in Oxnard.

Q. What time of the day was it?

A. I think it was in the morning.

Q. Was anyone else present?

A. Mrs. Towry, his wife.

(Testimony of John William Medlen.)

Q. His wife? A. Yes.

Q. Is his wife related to either of the plaintiffs [33] in this action?

A. I believe his wife is the former Helen De-lozier, the sister of Vivian Winget, the plaintiff.

Q. Did you ask Mr. Towry any questions relating to the accident at that time? A. I did.

Q. Did you reduce the statement made by him to writing? A. I did.

Q. When did you do that?

A. I believe I took notes from Mr. Towry on one day and perhaps wrote the statement out in longhand, and perhaps a day or two later had a typed statement and returned to his home and asked him to sign it.

Q. Several days after your first conversation?

A. I believe it was two or three.

Q. And did Mr. Towry sign the statement when you returned it to him? A. Yes, he did.

Q. Did you have any further discussion or conversation with him concerning the statement at the time he signed it?

A. When I returned with the typewritten statement, I, of course, asked him to read it over and make certain everything I had caused to be typed there was correct. [34]

Q. Did he read the statement you had typed in your presence? A. Yes.

Q. And did he then sign it?

A. That is correct.

Q. I show you a two-page typewritten statement

(Testimony of John William Medlen.)

bearing date July 11, 1949, and purporting to be signed by Billy Ray Towry, and ask if that is the document to which you have referred?

A. That is the document, yes.

Q. I note on page 1 the initials "B.R.T." Can you tell us who put the initials on the first page?

A. Billy Ray Towry.

Q. That was in your presence?

A. That was in my presence.

Q. I notice the initials on the second page after the sentence reading, "I have read the above statement of approx. 1¾ pages and it is true to the best of my knowledge. B.R.T."

Who put the initials "B.R.T." there?

A. Billy Ray Towry.

Q. In your presence? A. That is correct.

Q. And he subsequently signed on the following line, "Billy Ray Towry"? [35]

A. That is correct.

Mr. Wynn: We offer this as defendant's exhibit next in order, if the court please.

The Court: It may be received and marked Exhibit E.

The Clerk: So marked.

(The document referred to was received in evidence and marked Defendant's Exhibit E.)

The Court: I notice it is 12:00 o'clock. I think it is time to take our noon recess.

Ladies and gentlemen of the jury, we are about to take another recess. It is my duty to admonish

(Testimony of John William Medlen.)

you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition, we will now recess until 2:00 o'clock, this afternoon.

(Thereupon, a recess was taken until 2:00 p.m.) [36]

March 27, 1951—2:00 P.M.

(The following proceedings were had outside the hearing and presence of the jury:)

Mr. Wynn: If the court please, in these consolidated cases, counsel for plaintiff Mack have agreed with counsel for the defendant to a settlement of the claim of Mack upon the stipulated judgment in favor of Mack in the sum of \$6,000. Together with this stipulation for judgment is submitted at the present time an application for a ruling of the court that the plaintiff Winget *in* limited in any event to a recovery under the policy of the defendant in the principal sum of \$10,000 plus interest and costs.

It is further moved by defendant Standard Accident Insurance Company and the plaintiff Mack that this court make its order at this time authorizing the defendant Standard Accident Insurance Company to effect and conclude the settlement with the plaintiff Mack upon the terms stated.

(Testimony of John William Medlen.)

Mr. Hollingsworth: We join in that stipulation, may it please the court, on behalf of the plaintiff Thomas B. Mack, and also in the request for the order to the effect that the total recovery on behalf of the plaintiff Winget under the terms of the policy set forth in the pleadings and admitted by counsel be limited to the sum of \$10,000, together with costs and interest to date. [37]

Mr. Heily: Your Honor, on behalf of the plaintiff Winget, I oppose the motion and point out to the court there is at the present in existence an injunction by the State court, which I believe is a valid injunction, preventing the defendant Standard Accident Insurance Company from settling with the plaintiff Mack at any time until final disposition of this case.

In addition, I have a letter signed by Mr. Wynn, dated September 26, 1950, advising me that, "Our client," referring to Standard Accident Insurance Company," has no intention of paying any amount to Harry B. Mack, his attorneys or agents, before a final decision in this case."

In addition, your Honor, we feel that the law, and the only law that has been found on the point, favors the position of the plaintiff Winget to the effect that she is entitled to the pro rata share of the total of \$20,000 due and payable under the terms of the policy.

I further direct your attention to the fact that once liability has been established, then it becomes a matter of a moot question so far as the insurance

(Testimony of John William Medlen.)

company is concerned as to whether the money is split pro rata or not.

I direct your attention further to the fact that you denied a motion to remand this cause to the State court on the grounds, as I understand it, that the controversy between the plaintiff Winget and the plaintiff Mack was entirely [38] a separate controversy from the one between the plaintiff Winget and the defendant Standard Accident. If the court is to remain consistent with that ruling given on that motion to remand, it must decide against the present motion before the court.

There is a brief on file in the Winget case by me in which I brought out these points of law, in which I have set out definite State law against the granting of this motion in favor of prorated distribution. There is no law to the contrary anywhere in the country that I have been able to find, and I have searched diligently, no law whatsoever to the contrary.

The Court: Doesn't it seem awfully strange to you that this question hasn't been raised before?

Mr. Heily: No, your Honor, it does not seem strange to me, because it seems so just and fair, and that is probably why it never has been raised before. That is why it has never been raised very often. It has been raised.

The Court: In California?

Mr. Heily: Not in California. Counsel for the other side has cited no cases in the whole country in favor of their position.

(Testimony of John William Medlen.)

Mr. Wynn: I must challenge that.

The Court: Just a moment, please. It seems to me that the insurance companies have been writing policies like this [39] for years in California, where they have a 10 and 20 liability. It seems to me that if there was any merit to your contention that you could set aside the terms of the policy so that one person could collect more than the limits that there would be some recorded cases. I am quite sure that the insurance companies wouldn't allow a contract to be interpreted in that way without protesting in some way by a hearing. The fact that there are no cases is an indication to me that nobody has ever raised the issue.

Mr. Heily: The reason why the insurance company has never raised the issue is because the insurance company is paying the limit of their liability under the policy, anyway, for the one accident, and how the money is split from that time on is a matter entirely immaterial to them. That is my understanding of your ruling in refusing to remand the case, that that very point prevents a controversy between the insurance company and the defendant Mack and the plaintiff Winget, and that is the reason why the case was not remanded.

Let's put it on another basis of any time a creditor has money coming from a debtor, and another creditor has money coming from a debtor. Surely you are not going to prefer one over the other when

(Testimony of John William Medlen.)

the money is all there to be divided pro rata according to their just dues.

The Court: How are you going to get around this where it says, "bodily injury liability, \$10,000 each person"? [40]

Mr. Heily: \$10,000 each person. I will explain how I get around that, and that is this. \$10,000 for each person is the limit of the company's liability to any one person injured in the accident. \$20,000 is the limit of the company's liability for the whole accident regardless of how many people are injured. When they satisfy that liability by paying the money into court or by paying it pursuant to an order of court, designating pro rata distribution, then their liability under the policy is discharged. From that time there is nothing further for them to be concerned with. It is just like a creditor putting his money into this court for distribution—I mean a debtor putting his money into this court for distribution between his creditors on a pro rata basis. There isn't a single difference. The contract, as far as I am concerned, means only that there is \$20,000 due under it. How it shall be pro rated is up to the court.

The Court: Well, you cite this case in 161 Atlantic 101. In that case, evidently, there was a \$10,000 limit.

Mr. Heily: A 5 and 10 policy.

The Court: And there were four judgments.

Mr. Heily: Yes.

The Court: Rendered at different times.

(Testimony of John William Medlen.)

Mr. Heily: In that case, the court held the money would be applied pro rata.

The Court: If we had a third party in here and each of [41] the parties had a judgment for more than \$10,000, then it would be impossible to have settled with each of the parties with a liability of \$10,000. Then there might be some reason for prorating it.

Mr. Heily: Let me give you a little of the history behind this law that I have discovered on this point. If the case has not proceeded to judgment, then a person that has a claim that has not proceeded to judgment has no standing in court to make the request we have. There is one distinction. But where the creditors have proceeded to judgment, and especially in the same case, on the same day, at the same time, each of them has a property interest in the nature of a judgment lien upon this fund of \$20,000. That is what the cases say.

The Court: Well, if this policy provided that the liability would be \$20,000 for each accident and eliminated the \$10,000 for each person, I would go along with you. You cite two cases here, an Oregon case, *Morris vs. Port of Astoria*, and *Lewis and Dolan, Inc., vs. Clark Lumber Company*, also an Oregon case, 204 Pacific 130. In those two cases there was a fund. There was no limitation as to each individual. There was a fund and the court held where there was a fund, it should be pro rated.

Mr. Heily: Yes. I believe I distinguish those cases on that point. The *Sentry* case is the only

(Testimony of John William Medlen.)

case directly in [42] point that has been presented to you by any of the parties to this action. It is directly on the point involved.

The Court: Well, I don't think there is any question about what the policy says. There is no dispute. The policy says the limit is \$10,000 for each person. If I awarded more than \$10,000 to each person, I am really setting aside the contract.

Mr. Heily: No, your Honor. Let me give you this case of O'Donnell vs. New Amsterdam Casualty Company, 146 Atlantic 770. In that case several plaintiffs brought action to recover on judgments totaling \$55,000. The limit of liability under the policy was \$20,000. There were several complaints still pending for trial. The ones that were before the court had judgments, you see, the same as here. They had agreed upon a distribution of the proceeds. The question of priority or pro rata didn't arise in that case because they had agreed on a pro rata distribution, but the court held in that case the company was discharged from further liability, from paying the full amount of the liability under their policy. That isn't changing their contract in any respect. Their contract is discharged and completely fulfilled by paying their \$20,000.

The Court: If the insurance company would pay \$20,000 in this court and the plaintiffs could agree as to its distribution, I don't think there would be any of this. [43]

Mr. Heily: That is true, but we are asking for a determination by the court of what we are en-

(Testimony of John William Medlen.)

titled to. That is the only difference. Under the law and justice of equity, it is the only fair thing to do, to give the one with the greater judgment the greater share. Supposing we had a terribly mangled case, Mrs. Winget here terribly mangled, and her judgment was \$150,000 and Mr. Mack had \$15,000. Are we to say that she is only entitled to \$10,000?

The Court: That's what the policy says.

Mr. Heily: No, your Honor, the policy does not say that. I contend that the policy says exactly the reverse.

The Court: Let's hear from the insurance company to see what they have to say about this, for the purpose of the record.

Mr. Wynn: There isn't much more I can add, your Honor, except to comment, No. 1, on my letter that counsel read. Do you have that available, counsel? I want to read the preceding paragraph.

"At the time of filing of notice above mentioned"—that is the notice of removal—"with Deputy Clerk Margaret Harrison, I advised said deputy an order to show cause was set for hearing at 10:00 a.m., and requested the clerk to make sure the documents on file by me were called to the attention of the judge prior [44] to the time of the hearing. The deputy clerk immediately left her desk, stating that she would at once place the documents in the file so that the judge would have them before him when the case came on for hearing."

(Testimony of John William Medlen.)

The Court: My understanding is that the minute the petition for removal is filed, a bond is put up in the Superior Court, and there is nothing the Superior Court can do until it is remanded back to them. Any order made after the filing of the petition and putting up of the bond is a nullity. That is my understanding of the law.

Mr. Wynn: That is my understanding. Next, counsel observed that your Honor's denial of the petition to remand here was based on the belief that there was a separable controversy. At that time we cited, and I think the court considered, the case of Mannheimer Brothers against Kansas Casualty Insurance Company, 184 Northwestern 189. Without quoting the language from that, the court will recall that that was precisely in point. Two judgments had been obtained against the assured. The total amount exceeded the \$10,000 total coverage of the policy. One assured had been paid \$2,500. After making such payment, the plaintiff brought suit against the defendant insurance company, the plaintiff being the assured. Having paid the amount of the other judgment, the policy involved provided the company's liability [45] under paragraph 1 of the insuring agreements on account of bodily injury to or death of one person was limited to \$5,000, just as in the case at bar it is limited to \$10,000, and subject to the same limit for each person. The company's total liability on account of bodily injury to or death of more than one person is limited to \$10,000.

(Testimony of John William Medlen.)

It was contended by the plaintiff that since the insurance company had only been compelled to pay \$2,500 on account of the injuries sustained by one person it should be compelled to add the remaining \$2,500 to the \$5,000 admittedly due on account of the other judgment.

The court held the position, therefore, that the liability of defendant under the terms of the contract above quoted is limited to \$5,000 for each person injured, and the trial court was right in so holding. This disposes of plaintiff's further point that since the full \$5,000 wasn't used in paying the claim, the plaintiff may claim the balance of the amount to \$10,000. To grant this contention would also amount to a judicial remodeling of the contract.

The Court: Well, in my mind, there is no question that the limit is \$10,000 for each person, and the fact that one person cannot get judgment for \$10,000 or cannot collect \$10,000 is no reason the difference should be added to the other liability.

I understand that there was a restraining [46] order issued in this case after the petition for removal had been filed. I will now make an order vacating that restraining order on the ground that the Superior Court does not have jurisdiction to make the order.

Mr. Heily: May I point out that is a question of fact as to whether it was filed before the order was granted or not.

The Court: I understood you stipulated. If you haven't stipulated, then——

(Testimony of John William Medlen.)

Mr. Wynn: May I ask permission to be shown my testimony as to the filing——

Mr. Heily: Your Honor, perhaps we can stipulate. I will stipulate as to the fact that Mr. Wynn was there and presented the court with the papers.

The Court: And presented the bond?

Mr. Heily: Presented the papers to the clerk at the time when the file was before the court and on the court's desk. It becomes a question, in my mind, of law then as to whether that constitutes filing or not.

The Court: When you file a case in this court, what do you do? You go to the clerk's office and file it.

Mr. Heily: Yes.

The Court: And they put a stamp on it. Isn't that filing it?

Mr. Heily: It is filed, but isn't it also [47] necessary when you file something in a case that is pending for that file to reflect the fact that it is filed in it?

The Court: I don't think so.

Mr. Heily: It must be, your Honor, because otherwise this very situation would not have occurred.

The Court: I don't think so. You go over to file it with the clerk, and it is put in a drawer and it may not be in the file for two or three days.

Mr. Heily: That is negligence on the part of the clerk.

(Testimony of John William Medlen.)

The Court: I wouldn't say so. It is a question of personnel, not a question of negligence.

Mr. Heily: I contend it is not filed, especially in a case where the thing is before the court.

The Court: I am going to rule against you on that. The minute they take it to the clerk's office and file it, and the clerk accepts it and stamps it, it is filed regardless. If that was done before the court ruled, the court didn't have jurisdiction.

Mr. Heily: That was done.

The Court: Is that the fact?

Mr. Heily: Yes.

The Court: Then I will vacate the restraining order on the ground that the Superior Court lost its jurisdiction upon the filing of the petition to remand. [48]

Mr. Heily: We also have a request in the complaint for the issuance of a restraining order, and that request would apply in this court.

The Court: All right. I will deny it. I will dispose of that right now.

Mr. Heily: I relied upon Mr. Wynn's statement he would not pay anyone off, or in an abundance of caution, I would have requested this court to issue it.

Mr. Wynn: Mr. Wynn stated he would not pay until further order of the court.

The Court: Do you want to file a petition restraining the insurance company from settling?

Mr. Heily: No, your Honor. The petition is on file and you have just denied it.

(Testimony of John William Medlen.)

The Court: I will deny it. If you want to do some more work and file a petition, I will deny it when you get around to it.

Now, I assume that with the vacating of the restraining order, the insurance company can make any settlement it wants to as far as Mack is concerned. I will make a ruling the liability to each person is \$10,000 as set forth in the policy.

Mr. Wynn: Your Honor, I thought I had offered that on behalf of counsel for Mack and the defendant, there is a stipulated judgment in favor of the plaintiff Mack in the sum [49] of \$6,000. Wasn't that correct?

Mr. Hollingsworth: Yes.

The Court: \$6,000?

Mr. Hollingsworth: \$6,000.

The Court: How about interest?

Mr. Hollingsworth: That is the total amount.

The Court: \$6,000?

Mr. Hollingsworth: Correct.

The Court: No costs?

Mr. Hollingsworth: No costs.

The Court: Such may be the order. Will you prepare a formal order for the files in this case? We like to have a formal order prepared on these matters.

Mr. Wynn: That will be done, your Honor.

The Court: That leaves for disposition the other case.

Mr. Henderson: I assume that we may withdraw?

(Testimony of John William Medlen.)

The Court: As far as I know, you may withdraw. You have no other interest in this case unless you want to help associate counsel.

Are you ready to proceed in the other matter?

Mr. Heily: Yes, your Honor.

The Court: We will take our recess first and then start in.

(Recess.) [50]

The Court: Is it stipulated the jury is present and in the box?

Mr. Heily: So stipulated.

Mr. Wynn: So stipulated.

The Court: Ladies and gentlemen of the jury, since noon a settlement has been made with the plaintiff Mack, and the plaintiff Mack is no longer in this case. The only plaintiff in this case now is the plaintiff Winget. The fact that a settlement has been made with the plaintiff Mack shall not be considered by you in any way relative to the establishment of the liability in the case now before you. You must disregard it entirely.

The defendant in this case is not waiving in any way the issue that has been raised in this case relative to the question of cooperation. That is the only issue before you in this case, is the question of cooperation.

Do you want me to add anything more? Doesn't that express the situation to the jury.

Mr. Heily: Yes.

Mr. Wynn: Yes, sir.

(Testimony of John William Medlen.)

The Court: You may proceed.

Mr. Wynn: I have two preliminary matters. The clerk of the Superior Court of the State of California for Ventura is here under subpoena with the files in the two actions mentioned. I think counsel has agreed with me that all items [51] from those files which we desire to submit in evidence here have been so submitted, with the exception of a partial transcript which counsel has handed me and which I am willing to stipulate to. So I would ask the court to relieve the Clerk of the Superior Court from further attendance, with the agreement of counsel.

Mr. Heily: If the court please, that was not my understanding with reference to the clerk. It was with reference to the court reporter. There is one matter of some jury instructions I want the clerk for.

The Court: Might I suggest to you you withdraw this witness and put the clerk on the stand and get the testimony you want from him so he won't have to come back tomorrow? I know the clerks are very busy.

Mr. Wynn: I have no questions, your Honor.

The Court: Have you got a document there you want introduced in evidence?

Mr. Wynn: Plaintiff's counsel has.

Mr. Heily: Yes, your Honor.

The Court: Then will you step down, please?

(Witness withdrawn.) [52]

WILLIAM R. PEACOCK

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: William R. Peacock.

Direct Examination

By Mr. Heily:

Q. You are a deputy clerk of the Superior Court of Ventura County, State of California?

A. I am.

Q. Do you have with you the files of the two actions, one of which is entitled Delozier vs. Towry, and the other is entitled Mack vs. Towry?

A. I have.

Q. Do you have with you the instructions given at the time of the trial of those actions?

A. I have.

Q. Will you direct your attention to the instructions offered by the plaintiff Delozier, No. 27 and No. 30?

A. Yes.

Q. Directing your attention to instruction No. 27, defendant's requested instruction, is that an instruction that was offered by the defendant in that case? [53]

A. To my knowledge, it was.

Q. And was that instruction given?

A. No. It was either withdrawn or refused.

Q. Do you find a notation on it as to whether it was given or refused?

A. It was refused.

Q. And what does the notation say?

Mr. Wynn: Just a moment. I object to this

(Testimony of William R. Peacock.)

witness testifying as to whatever the instruction was, the contents thereof, or as to what notations are made by the trial court, on the ground generally that it is immaterial in this action, the only issue being raised by the defendant's affirmative allegations in its answer being the truth or falsity of representations made prior to the date of the trial. Whatever occurred during the trial has no bearing on that issue.

The Court: May I ask counsel how the fact that an instruction was or was not given would bear upon the question of the cooperation of the insured in this case?

Mr. Heily: Your Honor, the reason the defendant Standard Accident Insurance Company claims non-cooperation is because it deals with the matter of intoxication. We propose to prove there was no evidence of intoxication in this case. That instruction goes to prove that very fact.

The Court: My understanding is that at a certain time prior to the trial, the insurance company notified the [54] insured that it would not be responsible because of the non-cooperation of the insured. It seems to me that anything that happened after that is absolutely immaterial. In other words, I don't think the insurance company could rely upon any non-cooperation after they had refused to accept liability.

Mr. Heily: It goes to this point, your Honor. In order for the insurance company to avoid liability on the ground of non-cooperation, they must

(Testimony of William R. Peacock.)

show that Mr. Towry wilfully and falsely represented a fact, and that that fact is a material fact. Now, if this matter of drinking is material to the issues in the case in the state court, then perhaps there is something to their defense, but we intend to show, and that is what I am attempting to do now, that the matter of whether the man was drinking or not is immaterial, and any representation he makes is immaterial because there wasn't any evidence of intoxication.

The Court: Let me ask you, in your complaint did you allege that the insured was drinking at the time of the accident?

Mr. Heily: Yes. We alleged that in our complaint and we moved to dismiss that allegation and that count in our complaint, and our motion was denied because counsel objected.

Mr. Wynn: Just a moment. I am going to object to these statements. [55]

The Court: If you are going to argue, it should be outside the presence of the jury.

Mr. Heily: This is what we propose to prove.

Mr. Wynn: I think that is prejudicial and the court feels likewise. Any statement made by counsel now as to what occurred would be prejudicial at this time.

The Court: Ladies and gentlemen of the jury, you are instructed no statement made by counsel, either in speaking to the court or speaking to each other or to you, is evidence in this case. It is purely the opinion of counsel. The court may disagree

(Testimony of William R. Peacock.)

with either counsel or both counsel as to what the law of this case is, so you will disregard the statement of counsel as to what the facts are.

Mr. Heily: You see, your Honor, the evidence concerning intoxication only goes to prove the materiality of any representation concerning it.

The Court: My understanding is, and you have stated before the jury, that this instruction was offered and it has been refused.

Mr. Heily: And the reason why it is refused is what we are presenting.

The Court: Is there a notation on the instruction?

Mr. Heily: Yes, your Honor.

The Court: Usually the court just marks it "Refused," without any other reason. [56]

Mr. Heily: In this case the court indicated a reason.

Mr. Wynn: Of course, I object.

The Court: Counsel, I suggest that you have the instruction marked for identification and leave it here, that is, if the clerk will leave it here, and I will rule upon the question a little later on as to whether or not the refusal or the reason for it can be read to the jury.

Mr. Wynn: That is agreeable to the defendant.

The Court: Of course, the clerk may not want to be locked up all night with his instruction.

Mr. Heily: That will be satisfactory. I don't know whether the clerk can leave the instruction.

The Clerk: Could it be photostated?

(Testimony of William R. Peacock.)

The Court: Yes, I think it could be photostated.

Counsel, I suggest this to you, that you make a copy of the memorandum and stipulate that is what is on the instruction and leave it here subject to future ruling of the court.

Mr. Heily: Very well. I will offer that for identification purposes, your Honor, with the right to substitute a copy.

The Court: It can be marked for identification only.

The Clerk: Winget's Exhibit 1, your Honor.

(The document referred to was marked Plaintiff Winget's Exhibit No. 1 for identification. [57])

The Court: Before the clerk gets away, will you make a copy of that and agree as to the copy so that there can be no question as to what is in the record?

Mr. Wynn: I was going to inquire of counsel whether he had a copy of that instruction in his file. Otherwise, we could substitute it.

Mr. Heily: I may be able to locate one.

The Court: Is there more than one instruction you want?

Mr. Heily: There are two, your Honor.

The Court: This was what instruction?

Mr. Heily: That was instruction of the defendant 27.

If the court please, due to the fact that this witness was called out of order and we did not have

(Testimony of William R. Peacock.)

him fully prepared, I therefore now ask to withdraw him and allow him to make an examination of those instructions so he can testify regarding them.

The Court: How many more instructions are there?

Mr. Heily: I don't believe there are any more to introduce, but I want him to testify generally regarding all of the instructions.

The Court: In what way?

Mr. Heily: As to whether there are any in the file that were given concerning this point.

The Court: I don't think that the instructions are material. The judgment was rendered in this case against the [58] defendant in that particular lawsuit. The judgment speaks for itself.

Mr. Wynn: Our defense is clearly defined and that is that there were matters of fact falsely represented to the defendant prior to the time of trial. What occurred at the time of the trial is a matter of interest, perhaps.

The Court: I think the only question in this case was the lack of cooperation on the part of the insured, and I think that lack of cooperation must be lack of cooperation before the insurance company denied liability. After they denied liability, I don't think they could raise the question.

Mr. Heily: Your Honor, it is lack of cooperation regarding a material point. To determine whether the point is material, we must go to the

(Testimony of William R. Peacock.)

trial itself. That is the only purpose of his testifying.

Mr. Wynn: Perhaps, if I may be permitted, our discussion and the argument now is going to be on matters that should be presented out of the presence of the jury in that we are necessarily involved in questions of law.

The Court: I am rather satisfied that if this argument is continued, the jury ought to be excused. You don't want to bring back the witness before tomorrow?

Mr. Wynn: As a matter of fact, we have another witness who is an attorney and in the same position and would like to [59] be called today, and I agreed, with the court's consent, to do so.

The Court: Supposing you withdraw this witness and let him look at his instructions. We will call this attorney and maybe we won't get in an argument with him. Maybe we can get rid of him this afternoon, and then we can still get rid of the clerk.

Mr. Wynn: Mr. Willard.

ROBERT B. WILLARD

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Robert B. Willard.

(Testimony of Robert B. Willard.)

Direct Examination

By Mr. Wynn:

Q. You are an attorney at law admitted to practice in the State of California?

A. That is correct.

Q. And have been for several years last past?

A. That is correct.

Q. You maintain offices in the City of Ventura and County of Ventura? [60]

A. For the last two years, yes.

Q. During that period of time, that is, during the last two years, have you had occasion to represent professionally Mr. Towry? A. I have.

Q. Do you recall any professional dealings with Mr. Towry on or about March, 1950?

A. Yes, I do.

Q. I recognize, of course, your professional relationship, but did you have occasion to discuss with Mr. Towry, the signing of a deposition in an action in which he was the defendant, pending in the Ventura Superior Court?

A. Yes, I did discuss it with him.

Q. Approximately when was the first discussion you had with Mr. Towry concerning this deposition?

A. Mr. Towry's father came in to my office on either March 14th or March 15th in 1950, and asked if I would help his son with respect to this lawsuit that was pending against him. I discussed the matter rather fully with his father, and Mr. Towry

(Testimony of Robert B. Willard.)

came in a day or two later. I can't give you the exact date. But it was in the week commencing Monday, March 13th, and it was probably the 16th or 17th of March, 1950.

Q. That is the year 1950? A. Yes, sir.

Q. At the time Mr. Towry came in, did he bring with [61] him the original deposition he had given in the lawsuit?

A. I am quite sure he did not.

Q. On any occasion while he was in your office, did he have the original deposition with him?

A. Yes, he did. I am not sure whether he brought it in or whether I obtained it from the reporter's office, but we had the original deposition during March, 1950, in my office.

Q. In any event, you discussed with him the contents of the deposition? A. That's right.

Q. During that conversation, did Mr. Towry indicate to you he wished to change some of the answers made in the deposition?

A. Yes, he did.

Q. Did he, in your presence, change those answers? A. Yes, he did.

Q. Did he then sign the deposition before a notary public? A. Yes.

Q. To the best of your recollection, that was somewhere around March 16, 1950?

A. Mr. Towry corrected the deposition in his own handwriting and signed it and swore to it before a notary public. I think it was probably a few days after March 16th. [62] He came in the office several times and we talked this over fully,

(Testimony of Robert B. Willard.)

and I know that it was prior to the time the trial started on March 27th, but I can't give you the exact day.

Q. Do you recall the name of the notary public before whom he signed the deposition?

A. Walter J. Fourt.

Q. And he officed just across the hall from your office? A. That is correct.

Q. Were you present when Mr. Towry signed the deposition? A. I was present, yes.

Q. Had Mr. Towry made these changes in the deposition in his handwriting at the time he appeared before Judge Fourt?

A. He had just completed making the changes in his handwriting.

Q. Immediately after the changes were made, you went to Judge Fourt's office and he signed the deposition?

A. I might explain it this way. It was either on a Saturday afternoon, Sunday, or in the evening, when he finished making the corrections on the deposition, and we then began looking for a notary public. While I was telephoning a notary public at his home, I heard Mr. Fourt come in and we then went over to Mr. Fourt's office. It was probably 15 or [63] 20 minutes following the time Mr. Towry had completed making the changes that he signed the deposition.

Q. Further to fix the date of your conversation with Mr. Towry, when he made these changes, did

(Testimony of Robert B. Willard.)

Mr. Towry indicate to you that he had received any communication from his insurance company?

A. Yes, he did so indicate, and showed me the communication.

Q. Do you recall the date of that communication?
A. It was March 13, 1950.

Q. And then it was in a matter of two or three days after that that he came to you to change the deposition?

A. That is correct, to the best of my recollection.

Mr. Wynn: That's all.

The Court: May I ask this witness a question?

Mr. Wynn: Certainly.

The Court: I understand that your testimony is that he didn't sign the deposition until after he had made the changes?

The Witness: That is correct, yes, your Honor.

Cross-Examination

By Mr. Heily:

Q. After he had made those changes, Mr. Willard, did you advise the attorneys for the insurance company that the [64] changes had been made?

A. Yes, I did.

Q. When did you notify them to that effect?

A. Well, it was prior to the trial on March 27th. I can't state the exact date. On March 20, 1950, there was a motion filed in this case, in which I represented Mr. Towry in opposition to the attorney for the insurance company, and on that date

(Testimony of Robert B. Willard.)

I had a rather lengthy discussion with one of the attorneys for the insurance company, at which I know I either told him that the changes had been made or would be made. I do not recall whether they had been completed at that time.

Q. Did he ask you anything about the nature of the changes?

Mr. Wynn: I object to this question. No proper foundation laid. I would like to have the date, time, persons present, and so on, as long as he is going into a conversation.

The Court: You are the one who laid the foundation. You opened the door.

Mr. Wynn: Well, now he is relating a conversation, but no date or time. There is no foundation for this conversation.

The Court: It is my understanding that when he came in to sign the deposition is the time, or am I wrong? [65]

Mr. Heily: It is on the 20th of March, to the best of my recollection.

Mr. Wynn: This is another date, your Honor.

The Court: Well, I will sustain the objection upon the ground that the proper foundation has not been laid.

Q. (By Mr. Heily): Where did this conversation with the attorney for the insurance company take place?

A. It took place in the court house at Ventura in the law library or in the court room, one of the two places.

(Testimony of Robert B. Willard.)

Q. Who was the attorney?

A. I will have to refer to my notes. It was one of the five or six gentlemen in the firm there.

Q. May I suggest Thompson?

A. Mr. Thompson of Kelly, Bauder, Thompson, Kelly and Veatch.

Q. It was Mr. Thompson with whom you had that conversation?

A. That is correct.

Q. That was on or about the 20th of March in the court house in Ventura?

A. That's right.

Q. Who else was present?

A. No one else was present who overheard the conversation.

Q. At that time was Mr. Thompson representing the [66] insurance company on behalf of Mr. Towry?

Mr. Wynn: That calls for an opinion and conclusion of the witness.

Q. (By Mr. Heily): If you know.

A. I can only answer that by this explanation. Mr. Thompson was present in Ventura presenting a motion to withdraw as counsel for Mr. Towry. I represented Mr. Towry in opposition to the motion allowing Mr. Thompson to withdraw. The court refused to grant Mr. Thompson's motion and stated that Mr. Thompson must remain as counsel and try the case.

Then Mr. Thompson and I sat down to discuss the case on its merits.

Q. In making his motion to withdraw from the case, did he advise the court he was acting on be-

(Testimony of Robert B. Willard.)

half of the Standard Accident Insurance Company in making his motion?

A. To the best of my recollection, he indicated Standard Accident Insurance Company had disclaimed liability and he wanted to be let out as attorney of record in the trial of the case.

Q. In order to refresh your memory regarding that matter, I hand you what purports to be a notice of motion to withdraw as attorney for defendant Towry, and ask you to look at the verification on that and then tell us, if you can, for whom Mr. Thompson advised you he was working.

A. Mr. Heily, I think I have explained that rather [67] fully to you. Mr. Thompson sought to be relieved as counsel for Mr. Towry. I looked over the notice of motion which he had served upon—purported to serve upon Mr. Towry, and found that he had not mailed it to Mr. Towry's address. Mr. Towry didn't have that paper or any notice of that action, and only after I examined the full file did I find the motion was coming up.

I then made a special appearance in opposition to the motion on the ground that the court had no jurisdiction to hear the motion and the court agreed with me and refused to hear the motion on the ground it had no jurisdiction to pass upon the matter. That left Mr. Thompson as attorney of record in the case.

I don't recall any discussion with him as to whom he represented, but he was attorney for Mr. Towry

(Testimony of Robert B. Willard.)

and he couldn't get out of it, and he told me he was going to go ahead and to defend the case.

Q. Do you recall seeing the original of what this purports to be?

A. I did see the original of that notice of motion in the court file in Ventura.

Q. Does that indicate therein for whom Mr. Thompson was acting?

Mr. Wynn: I object to that question as leading and suggestive. The witness has already been asked and has answered [68] the question.

The Court: Might I suggest to counsel, we have the file here, don't we? The file is the best evidence. If you have got the file here with the copy of the motion, the motion speaks for itself. I don't know whether the file will disclose what the ruling was.

Q. (By Mr. Heily): I hand you an official file and ask you if that is the motion you examined.

A. Yes, Mr. Heily, that is the motion.

Mr. Heily: I now ask permission to read a portion of that document. This is a notice of motion to withdraw as attorney for defendant Towry and an affidavit in support thereof filed by Bauder, Gilbert, Thompson, Kelly and Veatch for the defendant Towry. The affidavit in support of it reads in part as follows:

“State of California,

“County of Los Angeles—ss.

“Robert E. Kelly, being first duly sworn, says he is one of the attorneys of record for

(Testimony of Robert B. Willard.)

defendant Billy Towry. On October 7, 1949, my firm was retained by Cass and Johansing, legally authorized agents for Standard Accident Insurance Company of Detroit, to defend Billy Towry, sued as Billy Ray Towry.

“I proceeded to file an answer in behalf [69] of said Billy Towry and said company. On the 13th of March I was informed by Standard Accident Insurance Company of Detroit, plaintiff, through their legally authorized agent, that they had sent to defendant Billy Ray Towry a notice of disclaimer under that said automobile policy No. J894065, stating in said notice of disclaimer the reasons thereof, and I was instructed by said Standard Accident Insurance Company of Detroit, through their legally authorized agent, to file notice and withdraw as attorney for defendant Billy Towry.”

The Court: What was the date of the notice of disclaimer, when the notice was sent?

Mr. Wynn: March 13th.

Mr. Heily: March 13, 1950.

Q. So it was on the 20th of March that Mr. Thompson appeared in court to be relieved of representation on the part of Billy Towry, is that correct? A. That is correct, yes.

Q. And you opposed that motion on behalf of Mr. Towry? A. That is correct.

Q. And the court would not let Mr. Thompson get out of the case, is that correct?

(Testimony of Robert B. Willard.)

A. That is correct. [70]

The Court: Can it be stipulated he continued in the case and handled the defense?

Mr. Heily: Yes.

Mr. Wynn: So stipulated.

Mr. Heily: He did continue and handled the defense very ably.

The Court: I don't know whether opposing counsel will agree to that last statement.

Mr. Wynn: I refuse to stipulate that.

Q. (By Mr. Heily): At the time Mr. Towry made the changes in the deposition, did he discuss with you the reasons for making the changes?

A. Yes, he did.

Q. What did he say?

Mr. Wynn: Well, I think I will object to that as hearsay, not made in the presence of any persons representing the defendant.

The Court: I think I will overrule the objection.

Mr. Wynn: Very well.

The Witness: We had a lengthy discussion of this, Mr. Heily. It lasted probably two hours. It was a year ago and I don't remember everything that was said, but I do recall asking him to tell me in detail everything that happened on the day of this accident, which he did.

I asked him in particular about drinking, [71] whether he had had anything to drink, and if so, what, and he told me he had had a small quantity of beer during the day and nothing else to drink.

I asked him what he had told the insurance com-

(Testimony of Robert B. Willard.)

pany and why they were attempting to withdraw from the case, if he knew.

He explained to me in his deposition he had indicated he had not had any intoxicating liquor to drink.

I was concerned about that and asked him why, what the circumstances were when the deposition was given.

He stated to me that he had not had any opportunity to talk with counsel for the insurance company prior to the giving of the deposition, that he met his attorney, went into Mr. Hollingsworth's office, and they immediately started asking him questions, and when they came to the question of intoxicating liquor, he wasn't sure in his own mind whether beer was within the category of intoxicating liquor; that he wanted to protect the insurance company as much as he could, and he just said no, he hadn't had any intoxicating liquor to drink.

I then explained to him I thought it of the utmost importance that he correct his deposition until it stated the actual and absolute truth, I thought that was his duty, and he agreed that he would do so.

Then I went through the deposition with him in [72] detail, question by question, and asked him exactly what the facts were, and when he came to any answer that he considered not wholly accurate, I had him write in his own handwriting the correction on the face of the deposition.

In addition to that, I had quite a lengthy discussion with him about this technical point, as to

(Testimony of Robert B. Willard.)

whether the insurance company lawyers could withdraw from his defense. I don't know whether you want me to go into that.

Q. That is sufficient. Thank you. That's all. I believe I was about to go into the conversation with Mr. Thompson.

At the time you had the conversation with Mr. Thompson, you did advise him, did you not, the deposition was changed or about to be changed, is that correct? A. That is correct.

Q. Did you go into a discussion as to in what particulars the deposition had been changed?

A. I don't remember at this time how much detail I went into but I do know that I told Mr. Thompson that the deposition either had been or would be changed with respect to the question of his having had beer on the day of the accident.

Mr. Heily: That's all. [73]

Redirect Examination

By Mr. Wynn:

Q. Mr. Willard, when you first saw Mr. Towry in connection with this case, did he advise you that he had made a report to the insurance company shortly after the accident in which he denied the use of any intoxicants?

A. I think, if I refer to my notes, I could probably answer that better.

Q. Without referring to your notes, do you have any recollection?

A. I don't have any recollection of that.

(Testimony of Robert B. Willard.)

Q. Do you have any recollection that he told you that during the summer of 1949, he had made a written statement signed by him in which he denied the use of any intoxicants?

A. I have no recollection of that.

Q. When you went over the deposition with him in detail and he indicated to you he did not think beer was an intoxicant and answered as he did, did you point out to him the questions where he was directly asked whether he had consumed any beer?

A. We certainly went over those questions before we got through correcting the deposition.

Q. And when you and Mr. Towry appeared before Judge Fourt to sign the deposition, that is, for your client to sign, Judge Fourt said, "You are doing the correct thing by [74] making a true statement now," did he not?

A. Substantially that, yes.

Mr. Wynn: In substance. That's all.

Recross-Examination

By Mr. Heily:

Q. Mr. Towry told you at the time of taking the deposition he wanted to help the insurance company all he could, is that correct?

A. That is correct.

Mr. Heily: That's all.

The Court: May this witness be excused?

Mr. Heily: Yes, your Honor.

Mr. Wynn: Yes.

The Court: You may be excused.

(Witness excused.)

The Court: Now, can we get the clerk and see if we can get him excused this afternoon?

Mr. Wynn: We have one other person in connection with the deposition of Mr. Towry. The reporter is here who took that deposition, and I think there is no purpose in retaining him.

The Court: There is no insinuation that the reporter didn't transcribe the notes correctly? [75]

Mr. Wynn: No.

The Court: Counsel wants to know if you will enter a stipulation.

Mr. Wynn: That Mr. Van Vleck, the reporter, may be excused.

Mr. Heily: So stipulated.

The Court: You are not raising the issue that he couldn't read his notes?

Mr. Heily: No.

The Court: All right. You may be excused.

Mr. Heily: Mr. Peacock, please.

WILLIAM R. PEACOCK

recalled as a witness by and on behalf of the plaintiff having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Heily:

Q. Did you just finish examining the instructions in the trial of this action in the state court?

(Testimony of William R. Peacock.)

A. Yes.

Q. You did complete your examination?

A. Yes.

Q. Did you find any that referred to intoxication? [76]

Mr. Wynn: I interpose the same objection, your Honor, I made originally.

The Court: Same ruling. I don't think it is proper to—well, I don't know. The complaint in this case did say something about intoxication. Objection overruled.

You can answer yes or no. Did you find some?

The Witness: I did and I didn't. It is there, but it is stricken out by the court.

Q. (By Mr. Heily): You say the intoxication is mentioned in the instruction but stricken by the court? A. Yes, sir.

Q. Are you acquainted with the handwriting of the judge that tried the case? A. I am.

Q. What is his name?

A. William A. Freeman.

Q. Were you clerking for him at the time he served as judge in Ventura County?

A. I was.

Q. That is how you became acquainted with his handwriting? A. It is.

Q. Is that his handwriting that the word "intoxication" is stricken out of the instruction with? Is it signed by him? [77]

A. The word "intoxication" has two lines drawn through it in ink and Judge Freeman's signature is

(Testimony of William R. Peacock.)

below. I would say it is the same ink. There is also another notation above in his handwriting.

Mr. Wynn: Just for the sake of the record, may I now move to strike the answer of the witness subject to the court's ruling as immaterial in this action?

The Court: The only thing I am trying to do is get the instruction identified.

Mr. Wynn: That is what I thought. Now we are reading something into the record.

The Court: I don't want it read. I want it identified so tomorrow I can make a ruling on the question of whether it is material. What is the number of that instruction?

The Witness: 14, your Honor.

The Court: Can you make a copy of that instruction and have it here?

Q. (By Mr. Heily): Was that instruction given to the jury, Mr. Peacock?

Mr. Wynn: I object to that as entirely immaterial in this action under the case of Valladao against Firemen's Fund Insurance Company. It has no bearing.

The Court: Does the instruction itself say whether it was given or refused?

Q. (By Mr. Heily): Does it? [78]

A. Yes, it does.

The Court: Then I will sustain the objection as the instruction itself is the best evidence. If you can get a copy of it, we will rule on all these matters at one time.

(Testimony of William R. Peacock.)

The Clerk: Should they be marked as Winget's exhibit for identification?

The Court: Yes.

Mr. Heily: That's all.

Cross-Examination

By Mr. Wynn:

Q. You have the file in the case of Winget vs. Towry?

A. I believe it was Delozier at that time.

Q. Delozier? A. Yes.

Q. Will you turn to the complaint in the action? This is the original file of the Superior Court of Ventura County? A. Yes, sir, it is.

Q. And this is the original complaint filed in the action? A. Yes.

Mr. Wynn: With the court's permission, I would like to read the counts 2 and 3 of the complaint. It should be before [79] the jury.

The Court: I have no objection to your reading those counts to the jury, but if you read those counts to the jury, I think the defendant should then have the right to establish the fact that he made a motion to dismiss which was denied. I understand that was the statement. I want all the facts to go to the jury. I don't want just part of the facts.

Mr. Wynn: I agree with you. I don't think that is pertinent in this action and I will withdraw the offer.

That's all.

(Testimony of William R. Peacock.)

The Court: Now are we going to get a copy of the complaint in this case that was filed?

Mr. Wynn: I think not, your Honor.

Mr. Heily: I have a copy, official copy, your Honor.

The Court: It would be fine if opposing counsel would stipulate that was a copy, but I don't want to excuse this witness and then tomorrow find out you can't establish it is the original or a certified copy.

The Witness: I will be glad to come back tomorrow.

The Court: Will you be in town tonight?

The Witness: No, but I only live 60 miles away and I would just as soon come back.

Mr. Heily: I have a completed copy of the complaint here. Will you stipulate this is a copy?

The Witness: We have a photostatic copy of the complaint [80] in the file.

Mr. Heily: I believe that is the complaint in the Winget action.

The Court: Can you stipulate that is a copy of the complaint?

Mr. Wynn: I have a photostatic copy. Counsel and I will stipulate. We will have no difficulty.

The Court: All right.

Mr. Heily: I now offer this for identification.

The Court: It may be received and marked Winget for identification.

The Clerk: So marked, Exhibit No. 3.

(The document referred to was marked Plaintiff Winget's Exhibit No. 3 for identification.)

The Court: Can this witness be excused?

Mr. Wynn: Yes.

Mr. Heily: Yes.

The Court: You may be excused.

(Witness excused.)

The Court: Now it is nearly 4:00 o'clock. I think we'd better take a recess until in the morning.

Ladies and gentlemen of the jury, again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, [81] you are not to formulate or express any opinion as to the rights of the parties or you must not speculate as to any of the things that occurred in the court room today. The testimony you will consider is the testimony that will be given to you from the witness stand or by stipulation of counsel. It is very important that you do not discuss this case with your immediate family or your friends.

When this case has been finally submitted to you, you can discuss it and you can form an opinion. Until that time, you are not to discuss this case or you are not to formulate or express an opinion.

With that admonition, we will now recess until 10:00 o'clock in the morning.

Mr. Heily: May I request you to instruct witnesses that they are to return tomorrow?

The Court: All witnesses who have not been excused in this case, including Mr. Mack, will return to this department tomorrow at 10:00 o'clock without any further notice.

(Thereupon, an adjournment was taken until 10:00 o'clock a.m., March 28, 1951.) [82]

March 28, 1951, 10:00 A.M.

The Clerk: No. 12327-HW Civil, Winget vs. Standard Accident Insurance Company of Detroit for further jury trial.

Mr. Heily: Ready for the plaintiff.

Mr. Wynn: Ready for the defendant.

The Court: Is it stipulated the jury is present and in the box?

Mr. Heily: So stipulated.

Mr. Wynn: So stipulated.

The Court: You may proceed.

Mr. Wynn: If the Court please, ladies and gentlemen of the jury, there have been interludes, as you may recall, since the witness I was examining, Mr. Medlen, was last on the stand. At the time he was under examination, a document was admitted in evidence as Defendant's Exhibit E. I will ask the court for permission at this time to read that document to the jury.

The Court: It may be read.

Mr. Wynn: Perhaps it would be well for Mr. Medlen to take the stand again. He was under examination.

The Court: All right. [84]

JOHN WILLIAM MEDLEN

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows:

Mr. Wynn: I am now reading the legend, Defendant's Exhibit E, which is dated July 11, 1949.

"My name is Billy Ray Towry, age 22. I live with my wife, Helen, at 11-18 Alameda Dr., Oxnard, Calif. My wife is the former Helen DeLozier. I am employed by the Associated Oil Co., 164 W. Santa Clara St., Ventura, Calif.

"On the afternoon of Jan. 26, 1949, some time between 3:00 and 4:00 p.m., my brother-in-law, Thomas Mack, and my sister came to my mother's place at 120 E. Ramona St., in Ventura. At that time this was also my home. From that time until about 5:00 p.m., we just chatted. At about 5:00 p.m., Tom and I got into my 1948 Chevrolet sedan to drive to the DeLozier home, located on the outskirts of Oxnard, to as Helen and Vivian DeLozier to have dinner at Tom's home. We drove directly to the DeLozier home on Beach Road, which is about 4 miles west of Oxnard. When we arrived, Mrs. DeLozier told us that the girls were in Oxnard. We then drove into Oxnard to try to find them, we did find them at the bus stop. [85]

"The four of us then started for the DeLozier home. Before we left Oxnard, Tom wanted to stop at a Bonding Co. to try to arrange to obtain a bond that he said was necessary for a job

(Testimony of John William Medlen.)

he was trying to get. We did this and I understand he was not successful. We drove to the DeLozier home and waited while the two girls changed clothes. At about 6:00 p.m., we started back toward Ventura. The weather was clear and dry and it was not dark enough to require headlights. Tom was in the front seat with me and the two girls were in the back. We were driving east on W. 5th St. at a speed of about 55 m.p.h. The road is a two-laned concrete road about 18 feet wide, with wide dirt shoulders on either side. At a point about 2 miles west of Oxnard I saw a hole ahead of me in the concrete. The hole was located about in the center of the road and appeared to be about 2 feet wide. It was though the top one or two inches of the concrete had been knocked or chipped out. I turned my car to the right to go around the hole and at that time the two right wheels of the car left the pavement and dug into the soft shoulder.

“When I returned to the scene of the accident [86] several days later my tire marks were still there and I saw that the tires had sunk into the soft dirt to depth of about 3 inches. The road is about 2 inches higher than the dirt shoulders. The car started to weave slightly and I then applied my brakes and at the same time turned to get back on the road. The car did turn back on the road very suddenly and I lost control swinging clear across the road, across

(Testimony of John William Medlen.)

the dirt shoulder on the other side and ended up in the ditch on the north side of the road. I was knocked unconscious. The next thing I remember there were two California Highway Patrolmen at the scene. Helen and I were loaded into the police car and taken to the Lying-In Hospital in Oxnard. None of us had any intoxicating liquor to drink. No one paid or offered to pay me for any part of the ride. To the best of my knowledge, no one asked me to slow down or in any way cautioned me about my driving. I say, to the best of my knowledge, because my wife Helen has since told me that her sister, Vivian, said on the way to the DeLozier home—‘Hey Bill take it easy.’ Helen says this was said laughingly just after I had rounded a corner. Thomas Mack had ridden with me on several occasions prior to this date and several [87] times since the accident and has never complained about my driving. The California Highway Patrol, who investigated this accident, did not cite me for any violation.

“I have read the above statement of approx. 13 $\frac{3}{4}$ pages and it is true to the best of my knowledge. B.R.T. (signed)

Signed “BILLY RAY TOWRY.”

(Testimony of John William Medlen.)

Direct Examination

(Continued)

By Mr. Wynn:

Q. Now, Mr. Medlen, the statement I just read to the jury, you obtained on or about July 11, 1949?

A. That is correct.

Q. Had you had any conversations with Mr. Towry prior to that time concerning the happening of the accident, other than you have related in your testimony? A. I don't recall any.

Q. Had you had any conversations with either the plaintiff Vivian Delozier, now Vivian Winget, or the plaintiff Thomas Mack, prior to this time in July, 1949?

A. I don't believe I talked to the plaintiff Vivian Delozier. As I recall, her memory was gone at the time. She had no recollection of it. I don't know whether I learned that prior to that or afterwards. I did talk to Mr. Mack [88] about the first part of April, 1949.

Q. Where did that conversation take place?

A. That was at Mr. Mack's home. I think it was two or three doors down from the Towry residence.

Q. They lived on the same street?

A. They lived on the same street, yes, sir.

Q. To your knowledge, were they related at the time you talked to Mr. Mack?

A. Mrs. Mack was Mr. Towry's sister. He was his brother-in-law.

Q. Who was present at the conversation?

(Testimony of John William Medlen.)

A. Just Mr. and Mrs. Mack.

Q. Will you relate *not* the substance of the conversation which occurred at that time?

A. Well, I went out there for two purposes. One, a medical payment feature, and also an answer to a form questionnaire or statement that Mr. Mack had returned to my office. This statement consisted of the nature of his injuries, who were his doctors, his hospitalization, and the purpose of the trip, and then describing the accident.

Under the description of accident, I recall that there was written, "Not gross negligence. You guys find out the rest."

So I questioned Mr. Mack about this, and I recall him saying something to the effect that, "Well, I must have [89] been very angry at that time or upset," or something to that effect.

Q. Did you have any conversation with Mr. Mack at that time as to whether any of the parties, and specifically Mr. Towry, had been drinking anything during the day?

A. Yes. I believe Mr. Mack told me that there was no drinking involved.

Q. This occurred about April 1949, is that right?

A. Some time the first part of April, yes, sir.

Q. Then was the next conversation you had with either Mr. Towry or any of the plaintiffs-claimants in this action July of 1949?

A. No. I believe I talked to Mr. Mack probably two months later at the Towry home on Ramona.

(Testimony of John William Medlen.)

Q. Did that conversation relate to the occurrence of the accident?

A. No, merely to the medical bills that had been submitted for his injuries.

Q. When was the next conversation you had with either of the parties to this action or, I should say, with either Mr. Mack or with Vivian Delozier Winget? When was the next conversation after the July conversation?

A. I don't believe I talked to Mr. Mack again. I talked to Vivian Delozier or Vivian Winget at the home of her parents in Oxnard, and at that time I recall that her memory [90] was still a complete blank as to how the accident occurred.

Q. Then subsequently did you talk to Mr. Towry again? A. Yes, I did.

Q. When was that?

A. That was either in the evening of November 30th or December 1st.

Q. Of the year—— A. 1949.

Q. Where did the conversation take place?

A. That was at the home of Mr. Towry's parents.

Q. What time of the day was that?

A. I believe it was early evening. I think he had just got home from work, and I am quite certain I was waiting for him when he did get to his parents' home.

Q. Who was present at the conversation, either participating in it or close enough to overhear what was said?

A. Mr. and Mrs. Towry, the parents.

(Testimony of John William Medlen.)

Q. Did you state to Mr. Towry at that time the purpose of your call? A. I did.

Q. What did you say to him?

A. I told him that I had received a communication from my office and after reviewing the depositions of Mr. Mack and Mr. Towry, that it was obvious someone was lying. [91]

Q. In what respect?

A. In the question of drinking. I believe Mr. Mack testified there had been drinking and Mr. Towry denied there had been drinking in the deposition.

Q. What was said by Mr. Towry, in substance?

A. Of course, I went out there to try to get the truth, and if it was the truth, to make sure he was telling us the truth, and he remarked at that time, "Well, if I change this story, you guys might dump that back in my lap."

I said, "That is a decision for the company to make. I cannot say. I don't believe they will."

And then he went ahead to relate he had been in either three cocktail bars or beer places and he had been drinking.

Q. Did anything further occur at that conversation? Was anything further said by any of the parties in substance that you have not yet related?

A. I don't recall anything, sir.

Q. You passed on the information you obtained in the regular course of your business?

A. That is correct.

(Testimony of John William Medlen.)

Q. Have you had any further dealings with Mr. Towry in connection with this case?

A. I saw him next, I think, about a week ago.

Q. At my request? [92]

A. That is correct, sir.

Q. And that was in connection with Mr. Towry's being requested to appear in this court room?

A. That is correct.

Q. You had no conversation with him at that time concerning the events surrounding the accident?

A. No. The only thing we said is we both hoped it would be over with before long.

Mr. Wynn: That's all. Cross-examine.

Cross-Examination

By Mr. Heily:

Q. You talked to Mr. Mack in the first part of April 1949, is that correct?

A. That is correct.

Q. At that time, he told you that there had been no drinking of beer involved?

A. To the best of my recollection, that is correct.

Q. You are quite positive of that?

A. No, I say that was to the best of my knowledge. I am relatively certain, but I cannot make a definite statement he did tell me there was no drinking.

Q. Did you have a suspicion that there had been drinking at that time?

A. No. I asked that question always to pas-

(Testimony of John William Medlen.)

sengers in [93] a car under the guest statute of California, as to whether or not there was any drinking or wilful misconduct.

Q. You just asked him the one question, "Was there any drinking"?

A. I think I also asked if there was any payment for the transportation.

Q. Concerning the drinking, you just asked the one question, "Had there been any drinking?"

A. I believe so.

Q. And he said "No"?

A. That's right, to the best of my knowledge. I want to qualify it that way.

Q. When did you first obtain any knowledge that there had been some drinking?

A. When Mr. Towry told me on either the evening of November 30th or the evening of December 1st, 1949.

Q. That is the first time?

A. That is the first time.

Q. When did you get the depositions back to read?

A. I have never read the depositions. I have never seen them.

Q. You told us you went to Mr. Towry's home on December 1st, approximately, and you told him that the depositions indicated that there had been drinking.

A. Mr. Mack's deposition indicated there had. I had [94] received a brief letter, you might say a resume of the depositions.

(Testimony of John William Medlen.)

Q. When did you receive that letter?

A. I believe it is dated November 8th, so I assume I received it in my office probably two or three days later than November 8, 1949.

Q. About November 10, 1949, you had some indication, didn't you, that there had been some drinking?

A. At least Mr. Mack was contending that.

Q. That was the first indication you had had?

A. That's right.

Q. Then you waited until about the 30th of November or 1st of December to go and see Mr. Towry?

A. I don't know whether you would call it waiting, or waiting to take a statement. I believe Mr. Towry was then and still is working out in the oil fields.

Q. In your conversation in the home of Mr. Towry when his parents were present, do you remember saying words to this effect to Mr. Towry about this drinking: "We'd better keep this quiet"?

A. I certainly do not.

Q. You didn't say that? A. No.

Q. You are positive of that?

A. I am positive of that. [95]

Q. When you asked Mr. Towry at that time whether he had been drinking, he said yes, he had been drinking some beer?

A. Not quite as soon as that. It was after some conversation.

(Testimony of John William Medlen.)

Q. He told you, though, he had been drinking some beer? A. That's right.

Q. He didn't say anything about intoxicating liquor. He said beer, didn't he?

A. I believe that is correct.

Q. And that's all he said he had been drinking?

A. I believe that is correct.

Q. Throughout your dealings with Mr. Towry after these actions were filed against him, you noticed, didn't you, that he was very disturbed and very angry that the actions had been filed against him, didn't you?

Mr. Wynn: Just a moment. That calls obviously for an opinion or conclusion of this witness, as to whether he was disturbed or angry.

Mr. Heily: I will withdraw the question. I think that is correct.

Q. Did Mr. Towry ever say anything to you about how he felt concerning the bringing of these actions against him? [96]

A. I don't recall any definite words. I rather imagine, of course, he was quite disappointed that his in-laws had filed such an action against him.

Mr. Heily: I believe that's all.

Mr. Wynn: No further questions. You may step down.

(Witness excused.)

Mr. Wynn: I will call Mr. Towry.

BILLY R. TOWRY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please, and state your name?

The Witness: Billy R. Towry.

Direct Examination

By Mr. Wynn:

Q. Mr. Towry, you were the defendant in actions filed against you in the Superior Court of Ventura County arising out of an automobile accident, were you? A. I was.

Q. And the plaintiffs in those actions were Vivian Delozier and Thomas Mack? [97]

A. They were.

Q. At the time of the accident, were these parties related to you in any way?

A. Thomas Mack was the only one.

Q. What was his relationship to you?

A. Brother-in-law.

Q. Subsequently, you became related with the plaintiff Vivian Delozier, now Vivian Winget?

A. Yes.

Q. What is the nature of that relationship?

A. Sister-in-law.

Q. What was the date of the accident giving rise to these actions, do you recall.

A. I don't recall the exact date, no.

Q. Some time in January, 1949?

(Testimony of Billy R. Towry.)

A. That was the accident?

Q. Yes. A. But not the——

Q. The lawsuit.

A. The lawsuit, that was later on.

Q. The accident occurred some time in January 1949 and the suits were not filed until a number of months later, is that right? A. Yes, correct.

Q. Shortly after the occurrence of the accident, do [98] you recall making a written report of the occurrence to your insurance company?

A. I did not make the report.

Q. I show you a document, which has been marked Defendant's Exhibit D for identification, and ask whether you have seen that document or the original of which this purports to be a copy before? Examine both sides, if you will.

A. I signed them from the Automobile Club. He fixed it up and brought them down to me to sign them.

Q. And then I take it this appears to be a carbon copy of your signature in the lower right-hand corner? A. Yes, it is.

Q. On the reverse side of the document?

A. It is.

Q. That was prepared for you and you signed it, is that right? A. Yes.

Q. It appears from figures I see in the lower left-hand corner, 1/28/49, possibly the date of January 28, 1949, was indicated. Does that refresh your recollection as to when you signed it?

A. January 28th, it was about that time, yes.

Mr. Wynn: We offer this document as defend-

(Testimony of Billy R. Towry.)

ant's exhibit next in order, having been marked only for identification. [99]

Mr. Heily: May I question the witness on voir dire before the offer is ruled on?

The Court: You may.

Voir Dire Examination

By Mr. Heily:

Q. Now, Mr. Towry, where were you when this statement was presented to you to sign?

A. I was in the hospital, Lying-In Hospital in Oxnard.

Q. What was your condition of health?

A. I don't remember signing it. This guy brought it in from the Automobile Club, and I recognized him. That is when I signed the document.

Q. Were you in the hospital for what injury?

A. I had a cut on my eye——

Q. The accident was January 26?

A. January 26.

Q. And this was the 28th when he came in to see you?

A. It was.

Q. At that time, did he hand you the document for reading?

A. No, I did not read it. [100]

Q. You did not read it?

A. He said it has to be in Sacramento within 10 days after the accident, and he was from the Automobile Club, so he filled it out and I signed it.

Q. He filled it out and you signed it without reading it?

A. I did not read it.

(Testimony of Billy R. Towry.)

The Court: May I ask a question? Was it read to you?

The Witness: No, sir.

Q. (By Mr. Heily): Do you recall anything that was stated in it, or have you ever read it?

A. No, sir, I have never read it.

Q. You don't know anything that is in it?

A. I don't know.

Mr. Heily: I will object to the admission, your Honor, under the circumstances. No proper foundation.

Mr. Wynn: The foundation is there. The person has signed the document.

The Court: Supposing he says he has never read it, it was not read to him, he was in the hospital and somebody came in and presented it to him and asked him to sign it? Do you think he is bound by the contents of the document?

Mr. Wynn: I think he is bound by it. He is a man over the age of 21 years. [101]

The Court: I will sustain the objection.

Direct Examination

(Resumed)

By Mr. Wynn:

Q. Mr. Towry, before the occasion on which you affixed your signature to the document, had you talked with any representative of the Auto Club concerning the accident? A. No.

Q. This person you spoke of as one you recognized from the Auto Club, what was his name?

(Testimony of Billy R. Towry.)

A. Kenneth Fraser.

Q. You had known him for some period of time?

A. I had.

Q. Long prior to the accident?

A. That's right. I had insurance with the Auto Club and he had taken care of anything I had through the Auto Club. I would always go to him.

Q. When did Mr. Fraser first discuss this accident with you as to the time of the occurrence, or anything in connection with it?

A. I don't believe he obtained the information from me.

The Court: That is not the question. The question is when did you first discuss the accident with him, Mr. Fraser, either before you were in the hospital or after you were in [102] the hospital?

The Witness: I believe it was after I was out of the hospital.

Q. (By Mr. Wynn): But you saw Mr. Fraser in the hospital on at least one occasion?

A. Yes, sir.

Q. Was there more than one occasion you saw him in the hospital?

A. I don't recall. Just the once.

Q. When he came to the hospital, did he talk with you before you signed the document?

A. No. He, I think, already had it filled out and he says he had to have this signed to get it into Sacramento within a certain length of time, and he said it would require my signature to be in and I signed it for him.

(Testimony of Billy R. Towry.)

Q. Did you inspect the document as to the description of the car involved? A. No, I *did*.

Q. Did you inspect it as to whether it reported any injuries to any persons? A. No, I didn't.

Q. Did you discuss the contents of the document with anybody before signing it? A. No.

Q. Did you discuss the occurrence of this accident [103] with Mr. Mack before signing the document? A. No.

Q. When did you first discuss the facts of the accident with Mr. Mack?

A. Oh, it must have been approximately four or five days after the accident, I imagine.

Q. Were you still in the hospital then?

A. I was.

Q. Do you wish this jury to understand that you did not read any portion of the document which I have handed to you before signing it?

Mr. Heily: Object to that on the ground that what he wishes is not important to this case.

The Court: Sustained.

Q. (By Mr. Wynn): Is it presently your testimony that you did not read one word of the type-written matter contained on the document which I have presented to you for examination before signing it? A. I didn't read it, no.

Q. You read no portion of it?

A. Not to my knowledge.

Q. When you say not to your knowledge, you mean your present recollection, is that right, is neither one way or another?

(Testimony of Billy R. Towry.)

A. No, sir. I couldn't tell you what was on the document, [104] one word, I couldn't tell you what was on it.

Q. Do you mean you don't know at present whether you read one word or not?

A. I didn't.

Q. You are positive you didn't?

A. Positive.

Q. Was the signature, the name of Mr. Fraser, on the document at the time you signed it?

A. Just on here just now is the only time I saw it.

Q. Was that signed in your presence?

A. I don't believe it was signed. It was just typewritten on the bottom there when I looked at the date just now.

Q. You looked at the date and you found the date, apparently, to be handwritten, did you?

A. Yes, I did.

Q. Do you know who placed this date on the document shown as the figures 1/28/49?

A. No, sir, I do not know.

Q. Do you know who wrote the other number below it?

A. No, sir, I don't. That isn't my writing.

Q. I say appearing above your signature——

Mr. Heily: I am going to object to any statements taken [105] out of the document as not properly in evidence.

The Court: I don't know whether you have a

(Testimony of Billy R. Towry.)

right to cross-examine this witness on that. He is your witness.

Mr. Wynn: That is true. I am examining as to something which appears here as to when he did it.

The Court: You are cross-examining, as far as I am able to ascertain. Of course, no objection is raised.

Mr. Heily: I will object to the fact that he is cross-examining his own witness.

The Court: I don't think you are entitled to read to the jury anything that is in the document.

Mr. Wynn: I don't intend to, your Honor.

Q. Did you place any writing or did you depict anything on this document before you other than the signature which you have identified?

A. No, sir.

Q. That question is clear?

A. He put the cross on there and I signed.

Q. My question was clear, you did not put anything else on this document? A. No, sir.

The Court: May I ask a question? The only thing you signed was your name?

The Witness: Yes, sir, that is all.

Q. (By Mr. Wynn): After this occasion in January 1949, [106] did you later make any statements concerning the facts surrounding the accident to anyone acting on behalf of your insurance company? A. I don't recall.

Mr. Heily: Do you understand the question.

The Witness: No, I don't understand the question.

(Testimony of Billy R. Towry.)

Q. (By Mr. Wynn): You recall, do you, that some time after the statement or the report of January 1949, you had some conversation with some representative of the insurance company?

A. Yes, sir.

Q. About when was that next conversation?

A. I think I went into Mr. Fraser's office and talked to him after the accident.

Q. And when was that?

A. Oh, approximately two weeks after the accident.

Q. Then subsequently did you meet Mr. Medlen in connection with the accident?

A. Yes, I did.

Q. And you recognize Mr. Medlen seated at the counsel table? A. I do.

Q. When did you first meet him?

A. It was in Mr. Fraser's office in the Auto Club in Ventura, I believe. [107]

Q. Did you have a conversation with Mr. Medlen in Mr. Fraser's presence?

A. I am not sure. We probably had conversation, introduction, everything. I don't recall the conversation.

Q. But this date approximately two weeks after the accident is the first one you recall?

A. Yes, sir.

Q. At that time did you examine a copy of the "Assured's Report" that you made on January 28 of 1949?

(Testimony of Billy R. Towry.)

A. You mean renew the insurance? Or what do you mean on that?

Q. I was directing your attention to the document you have inspected.

A. No, I did not read that.

Q. At that time? A. No, sir.

Q. What was the substance of the conversation at that meeting in Santa Barbara?

Mr. Heily: In where?

Q. (By Mr. Wynn): I thought you said Santa Barbara. Am I incorrect?

A. No, sir. Ventura.

Q. Ventura. I am sorry.

A. I went to see Mr. Fraser on several occasions on my car. He had my car towed to Los Angeles for repairs, and [108] that was probably the conversation. I don't recall, but I saw him on several occasions for that purpose.

Q. Do you recall on or about July 11, 1949, having a conversation with Mr. Medlen in your home?

A. I do.

Q. Who was present at that time?

A. My wife.

Q. Did she participate in the conversation?

A. No.

Q. Can you state in substance what was said now by Mr. Medlen and what was said by yourself at that time?

A. No, I don't recall. I don't recall the conversation.

(Testimony of Billy R. Towry.)

Q. But you do recall making some statements to him? A. I do.

Q. And subsequently did Mr. Medlen hand to you a statement purporting to be the substance of what information you gave on that occasion?

A. Yes, he did.

Q. I show you a document dated July 11, 1949, consisting of two typewritten pages, which is in evidence as Defendant's Exhibit E, and ask you if you have ever seen that document before?

A. Yes, I saw it. [109]

Q. Directing your attention to the initials B.R.T. appearing on the first page did you affix your initials there? A. Yes, I did.

Q. And likewise the initials B.R.T. on the second page? A. I did.

Q. And the signature "Billy Ray Towry" is yours? A. Yes.

Q. At the time you signed that statement, you read it, did you?

A. Well, yes, I did. I was asleep when he came there. I was working the morning tour in the oil fields, and my wife came in and woke me up and she said, "Mr. Medlen is here. He would like to talk to you." And so that is when I had to sign those.

Q. Do I understand, Mr. Towry, that Mr. Medlen called at your home only once in connection with your signing this statement?

A. Well, I don't recall that. I don't know if it was once or twice.

(Testimony of Billy R. Towry.)

Q. He didn't have a typewriter with him, did he, when he called? A. No.

Q. You do recall an occasion when he handed you a [110] document which you did then read and sign?

A. Yes, sir.

Q. Do you recall subsequently giving your depositions in the actions pending in Ventura County?

A. Yes, sir.

Q. That was on or about October 28, 1949?

A. Approximately.

Q. Did you later have an opportunity to read a transcript of the deposition given by you?

A. I did.

Q. When did you read it?

A. I don't know the exact date on that. Probably, maybe, two months later.

Q. Can you fix it as before or after the holiday season in 1949, after the first of the year?

A. I believe it was after the first of the year, yes.

Q. What was the occasion of your reading the deposition?

A. Well, let's see. I don't recall the first time I read it, even.

Q. Do you recall receiving in the mail some time in March of 1950 a notice from the insurance company? A. I did.

Q. You have been directed by subpoena duces tecum to [111] produce that in court. Do you have that with you?

(Testimony of Billy R. Towry.)

A. No. I have it in my car. I can bring it in during recess.

Q. It is available? A. It is available, yes.

Mr. Wynn: With the court's permission, we will pass that so you can get it later.

The Court: All right. We will take a recess in a few minutes and you can get it during the recess.

Q. (By Mr. Wynn): The notice which I have referred to, and which I will shortly present to you, or a copy, was received some time, to the best of your recollection, in March 1950?

A. Yes, it was.

Q. And that notice was received after the time that you had given your deposition in the case, was it not? A. It was.

Q. Was it received by you before the time you had first read a transcript of the deposition?

A. Let's see, now. I don't recall if it was or not.

Q. Mr. Towry, after receipt of this document, which you can produce after recess, can you not?

A. Yes.

Q. After receipt of that document, did you consult with Mr. Willard, an attorney, concerning the case? [112] A. I did.

Q. In your consultation with Mr. Willard, did you have a transcript of the deposition given by you? A. Yes.

Q. Approximately when was it you conferred with Mr. Willard?

A. Well, let's see. I had talked to Mr. Willard before I received this document that you sent.

(Testimony of Billy R. Towry.)

Q. Before you received the notice from the insurance company? A. Yes.

Q. At that time did you discuss with Mr. Willard your testimony given in the deposition?

A. I did.

Q. And did you have a copy of the transcript of that testimony at the time you first talked to Mr. Willard? A. Yes.

Q. So your first conversation with Mr. Willard was then before receipt of this letter of March 1950, and after what date? In other words, I am trying to say, was it after the first of the year you first talked to Mr. Willard?

A. Yes, it was after the first of the year. It was between March 13th and March 20th, along about that. On March 13th the letter was dated for the notice of withdrawal, which was the following Monday, would be the 20th. In the meantime, I hadn't received the letter, and he went to court for me and they couldn't get the motion for withdrawal through the court, because the letter was not properly sent. It hadn't had enough time to reach me for the court.

Q. So, as I understand it, and I don't want to be misleading, but only to be correct, you first discussed the matter of the testimony you gave in your deposition with Mr. Willard along about the 13th of March 1950? A. Yes, sir.

Q. Do you recall a conversation with Mr. Medlen in your home on or about November 30, 1949, or December 1, 1949? A. Yes, I believe I do.

Q. Do you recall that Mr. Medlen at that time

(Testimony of Billy R. Towry.)

told you that apparently someone was lying in connection with——

Mr. Heily: I object to this as leading.

The Court: What is the objection?

Mr. Heily: That it is leading, your Honor.

The Court: I think it is leading.

Q. (By Mr. Wynn): What conversation did you have with Mr. Medlen on that occasion? First, will you tell us who was present other than yourself and Mr. Medlen?

A. My mother and father were present, but my father, he doesn't hear very well, so he wasn't listening to the conversation.

Q. What did Mr. Medlen say to you in substance at [114] that time?

A. Well, he says that the deposition we had made the month before, there was mistakes in them some way and he wanted to straighten them out, that he was there to help me and not against me.

Q. What did he tell you, if anything, as to what you have referred to as the mistakes?

A. Yes, he mentioned drinking in there.

Q. What did you tell Mr. Medlen?

A. I told him I had.

Q. Did you say anything else? A. No, sir.

Q. Did Mr. Medlen say anything?

A. He just said he wanted to get it all straightened out before court, that the deposition was incorrect on my part and he was going to help me, not against me on it.

Q. Following that conversation, your next deal-

(Testimony of Billy R. Towry.)

ing with the insurance company was when you received a letter from them, is that right, in March of 1950?

A. Yes, I believe it was. I am not too certain about that.

Q. Then upon receipt of the letter in March, 1950, you consulted Mr. Willard, is that right?

A. Yes.

Q. And in the course of your dealings with [115] Mr. Willard, you made corrections upon the original deposition given by you, did you?

A. I did.

Q. And those corrections were made, to the best of your recollection, about what date?

A. It was about the—approximately the 18th to the 20th, approximately.

Mr. Wynn: I believe I have no further questions, your Honor, with one exception. I want permission to introduce the original document we have referred to after the recess.

The Court: Maybe it will be stipulated the copy can be introduced. I don't know. Do you have any objection?

Mr. Heily: I will have an objection to it, your Honor.

The Court: You will?

Mr. Heily: Yes.

The Court: All right. You can present it after the recess.

Mr. Heily: Do you wish me to start my cross-examination now?

(Testimony of Billy R. Towry.)

The Court: Well, maybe we'd better take our morning recess now.

Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, not to allow anyone [116] to discuss it with you, you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition, we will now recess until 10 minutes after 11:00.

(Recess.)

The Court: Before cross-examination, maybe you'd better introduce the document.

Mr. Wynn: Yes.

The Court: Is it stipulated the jury is present and in the box?

Mr. Wynn: So stipulated.

Mr. Heily: So stipulated.

Q. (By Mr. Wynn): Mr. Towry, you have now produced a letter which you received from the Standard Accident Insurance Company, have you?

A. I have.

Q. That is a letter bearing date March 13, 1950, consisting of two pages, and appearing to be signed by H. T. Ellerby? A. Right.

Q. You received that letter in the mail shortly after the date of March 13, 1950? A. Yes.

Mr. Wynn: We offer this in evidence as defendant's exhibit [117] next in order, if the court please.

(Testimony of Billy R. Towry.)

Mr. Heily: To which I object, your Honor, on the ground that the letter contains self-serving declarations and statements that have been denied admission into evidence already, and for the purpose of facilitating the trial, I am willing to stipulate that the letter denies liability to this assured, but so far as it being pertinent or material to any other issue in the case, it is entirely immaterial.

The Court: May I look at the letter? Mark it for identification first.

The Clerk: Defendant's Exhibit F for identification, your Honor.

(The document referred to was marked Defendant's Exhibit F for identification.)

The Court: I think the letter is objectionable because of the detail it goes into. I think the first two paragraphs are admissible, and also the last half of the next to the last paragraph and the last paragraph.

Mr. Wynn: Would you indicate again, your Honor, what that was? The first two paragraphs?

The Court: Yes.

Mr. Wynn: That would be ending with the quoted phrase?

The Court: With the quoted phrase. Then on the next page, five lines down, "The company further takes the position." [118]

Mr. Wynn: Through the remainder?

The Court: The rest of that, I think, is satisfactory. I will allow those portions of the letter

(Testimony of Billy R. Towry.)

to be introduced in evidence and read to the jury. The other portions I will not allow to be introduced in evidence and read to the jury. The letter cannot be shown to the jury by counsel, but you can read the portion indicated.

Mr. Wynn: Yes. I will read that at the present time with the court's permission.

Ladies and gentlemen, I am reading from a document which has been admitted in evidence in part as Defendant's Exhibit F, reading as follows:

Mr. Heily: May I interject just a moment? I believe you said, your Honor, the first two paragraphs.

The Court: Yes.

Mr. Wynn: Perhaps we should approach the bench.

The Court: All right.

(The following proceedings were had at the bench outside the hearing of the jury:

The Court: My ruling is down this far only, the first two paragraphs, and then beginning over here with "The company further takes the position."

(The following proceedings were had in the hearing and [119] presence of the jury:)

Mr. Wynn: The letter is addressed to Mr. Billy Towry.

"Dear Mr. Towry:

"On February 10, 1948, the Standard Accident Insurance Company issued to you its pol-

(Testimony of Billy R. Towry.)

icy of Automobile Liability Insurance No. J894065, covering a certain 1948 Chevrolet 4-door Sedan for certain bodily injury and medical payments limits for a period of one year. The policy provided, among other things, under Condition 8:

“ ‘Assistance and Cooperation of the Insured —Coverage A . . . The insured shall cooperate with the company and, upon the company’s request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits.’ ”

“* * *

“The company further takes the position that by virtue of your false testimony that you have failed to cooperate with the company as required by the terms thereof and as set forth above. You are advised that the company hereby disclaims any and all liability under its contract [120] by virtue of your breach thereof, to indemnify you for any loss arising out of any claims or law suits brought because of said accident, and further, denies any obligation to defend such law suits and further, denies any obligation or duty under said contract arising out of said accident or injuries to any person sustained therein.

“The company’s attorneys, Bauder, Gilbert, Thompson, Kelly & Veatch, have been in-

(Testimony of Billy R. Towry.)

structed to withdraw as your attorneys of record in the defense of said actions, and you are advised to make arrangements with other counsel to carry on your defense if you so desire."

No further questions.

Cross-Examination

By Mr. Heily:

Q. Mr. Towry, I hand you this statement you signed in July, Defendant's Exhibit E, and direct your attention to the phrase contained therein, "None of us had any intoxicating liquor to drink."

Now, Mr. Towry, what did you mean by making this statement?

Mr. Wynn: Just a moment. That calls for a conclusion of this witness. The document speaks for itself. His translation [121] is not admissible in evidence.

Mr. Heily: Withdraw it.

The Court: It has been withdrawn.

Q. (By Mr. Heily): What was your understanding at that time of the words "intoxicating liquor"?

A. Hard liquor.

Q. Would that include beer?

A. Not including beer.

Q. Since that time, have you ascertained that the words "intoxicating liquor" include beer?

A. Yes, I understand now.

Q. Now, at the time you had this deposition

(Testimony of Billy R. Towry.)

taken in October of 1949, had you been notified to be present at Mr. Hollingsworth's office?

A. Yes.

Q. Who had notified you?

A. I am not certain who notified me on that.

Q. Was it Mr. Thompson, the insurance company attorney? A. No.

Q. You don't recall?

A. It was not Mr. Thompson.

Q. Was it Mr. Veatch?

A. Veatch is the name.

Q. Did you arrive at Mr. Hollingsworth's office at [122] the appointed time? A. I did.

Q. Did you see Mr. Veatch there?

A. I did.

Q. Did he talk to you about the facts of this accident in any way, in any particular?

A. No. He introduced himself to me and he said, "It will be a little while before the depositions are taken." He explained there would be depositions taken there, but he didn't say of what.

Q. Is that the substance of his conversation with you before taking the deposition? A. Yes, sir.

Q. Did he explain to you anything about what the deposition was? A. No, sir.

Q. Did he instruct you on what the effect of taking a deposition was?

A. No, sir, he didn't explain to me.

Q. He didn't explain to you about what a deposition was? A. No, sir.

The Court: May I ask a question?

(Testimony of Billy R. Towry.)

Did you ever have a deposition taken before?

The Witness: No, sir. [123]

Mr. Heily: That was to be my next question, your Honor.

Q. When you did sit down to have your deposition taken, do you remember who all was present?

A. I can tell you as many as I know I remember being there.

Q. All right.

A. Mr. Henderson, Mr. Hollingsworth.

Q. They were attorneys for Mr. Mack?

A. That's right. And Mack himself, Vivian Delozier, and you were there, and I believe the court reporter was there.

Q. The court reporter was there, too?

A. Yes.

Q. And Mr. Veatch?

A. And Mr. Veatch, yes, sir.

Q. He was representing you, is that right?

A. Well, yes.

Q. And I was representing Vivian Delozier, now Vivian Winget?

A. Right, yes, sir.

Q. And Vivian's father was there, was he?

A. Yes, he was there.

Q. At that time, Mr. Towry, were there strained relations between you and your father-in-law and Vivian? [124]

A. Well, yes, sir.

Mr. Wynn: I think that is immaterial in the first place, if the court please, and in the second place, it calls again for an opinion and conclusion.

(Testimony of Billy R. Towry.)

The Court: Sustained upon the ground it calls for a conclusion.

Mr. Heily: I think that's right. The first ground isn't right, though.

Q. What was your feeling, Mr. Towry, when these actions were filed against you insofar as your in-laws were concerned?

Mr. Wynn: I think that is inadmissible on both grounds previously raised. It calls for his feeling.

The Court: Well, the only issue in this case is whether or not this witness cooperated with the insurance company.

Mr. Heily: Your Honor, may I point out the reason behind that? He has brought into evidence the fact that Mr. Towry was related to Vivian Winget, and he has brought out the fact that Mr. Mack was his brother-in-law, I believe, and I think the implication he is trying to get is something that the relatives were cooperating to beat the insurance company, and I am merely now trying to show that is not the case.

The Court: Of course, the question here is whether or not this witness cooperated. That may be a question of state of mind and intent. [125]

Mr. Heily: It goes to the weight, possibly.

The Court: Objection overruled.

Q. (By Mr. Heily): You tell us, Mr. Towry, how you felt about these actions being brought against you.

A. Well, I didn't like it when I heard about it.

(Testimony of Billy R. Towry.)

I knew there would be nothing but trouble, and there was trouble back and forth on the deal.

Q. What do you mean by "trouble"?

A. I mean we didn't get along too well on my wife's part and I. We didn't get along too well.

Q. Your wife is the sister of Vivian?

A. That's right. I couldn't think hard of my wife's sister, because it was her sister.

Q. You and your wife had a number of quarrels, is that right? A. That's right.

Q. How about your father-in-law?

A. We also had quarrels.

Q. Now, then, when you were asked this question in the deposition, "Did you have any intoxicating liquors," at that time did you still have the same understanding that you had in July regarding the meaning of intoxicating liquors?

A. Yes, I did.

Mr. Wynn: Just a moment. I think probably the deposition should be in front of the witness and reference made, so [126] we will know just what question is being referred to, your Honor.

The Court: I think possibly that is proper. The deposition ought to be shown to the witness. Now you are talking about the time when the deposition was taken?

Mr. Heily: Yes.

Q. I am showing you page 8 of the deposition, and quote to you from line 10:

"Q. No intoxicating liquor?

"A. No."

(Testimony of Billy R. Towry.)

The correction is, "No, except for some beer."

The Court: Don't read the corrections, because the corrections are immaterial at this time. You are talking about the time the deposition was taken.

Mr. Heily: Very well, your Honor.

Q. (Reading)

"Q. No intoxicating liquor?"

"A. No."

At the time you made that answer, what was your understanding with reference to the meaning of the words "intoxicating liquor"?

Mr. Wynn: Asked and answered, your Honor. Object to it on that ground.

The Court: Will you stipulate the answer is he didn't think—— [127]

Mr. Wynn: He has already answered over my objection.

The Court: Objection overruled.

Mr. Heily: That was concerning July, Mr. Wynn. Now we are referring to the time of the deposition.

The Court: Objection overruled.

The Witness: My belief on intoxicating liquor was hard liquor, not beer.

Q. (By Mr. Heily): Now, I direct your attention to the question on page 15, line 23:

"Q. You didn't drink any beer?"

"A. No."

At the time of making that statement, that you

(Testimony of Billy R. Towry.)

had not been drinking any beer, that was false, wasn't it? A. Yes.

Q. Will you tell us the reason, if any, for making that false statement?

A. Well, there hadn't anyone mentioned about drinking in the case before even in the hospital or after we left the hospital or anything. There hadn't been any mention about drinking. That is why I said no. I was cooperating with the insurance company.

Q. You felt, in other words, didn't you, if you answered no, your chance of having judgment taken against you would be lessened, isn't that right?

A. That's right. [128]

Q. And that would amount to avoiding the liability or avoiding having the insurance company pay? A. That's right.

Q. No one had told you anything about——

A. No one had said anything from the insurance company or anyone else about drinking. No one had mentioned it.

Q. Had anyone ever asked you if you had drunk any beer, anyone from the insurance company, prior to that time? A. No, sir.

Q. Had Mr. Medlen ever asked you if you had drunk any beer?

A. I don't recall if he asked me about that or not. There wasn't anything in the small deposition he taken at my home, if that is what that was.

Q. The only thing he asked you is, "Was there any drinking of intoxicating liquors," is that right?

(Testimony of Billy R. Towry.)

A. That's right.

Q. And there was none, was there, of hard liquor, as you understood it? A. No, sir.

Q. How much beer did you actually have that day? A. Approximately six bottles.

Q. Over what period of time?

A. From about 10:00 or 11:00 o'clock that morning until 5:30 or 6:00. [129]

Q. Did you eat during that time?

A. I did.

Q. How many times?

A. One meal at noon and about two or three sandwiches in the afternoon.

Q. Let's get this in chronological order. After the depositions were taken, the next time you were contacted by anyone from the insurance company was in the last part of November or early December, is that correct? A. That's right.

Q. Mr. Medlen came to see you at your home?

A. That's right.

Q. And at that time he stated to you that there had been some mistakes in the deposition?

A. That's right.

Q. And he asked you if you had been drinking beer? A. That's right.

Q. And you told him, didn't you, that you had been drinking beer? A. That's right, I did.

Q. Did you tell him how much beer you had had to drink?

A. Yes. I told him all the stops we made, no

(Testimony of Billy R. Towry.)

cocktail lounge, that they were cafes and they had beer.

Q. But you had beer there? [130]

A. That's right.

Q. And you had a total of not more than five or six bottles of beer?

A. That's right.

Q. Small bottles?

A. Small bottles, yes.

Q. Then at that time didn't Mr. Medlen say, about the time he was leaving, "Let's keep this quiet," or words to that effect?

A. He did.

Q. And didn't he step out of the house and then come back and tap on the door again?

A. He did.

Q. And what did he say then?

A. I opened the door, I was standing in front of the door, and he said, "We have to keep this quiet." He said, "Don't go talking to anyone about it."

Q. You had just had a conversation with your mother, didn't you, just after he left the first time?

A. That's right.

Q. And what were you discussing with your mother?

Mr. Wynn: That is objected to as hearsay.

The Court: I think that the conversation is hearsay, but is the topic of the conversation hearsay?

Mr. Heily: I don't think so. [131]

The Court: Overruled.

Q. (By Mr. Heily): Just tell us the topic of your conversation.

A. Well, I was just talking to my mother about——

(Testimony of Billy R. Towry.)

The Court: You can't tell what you said. The question is what were you talking about?

The Witness: We were talking about keeping it quiet, what did he mean by keeping it quiet.

Q. (By Mr. Heily): Did he overhear you saying that?

A. Well, I don't think he did. He might have. I don't know how close to the door he was, but he just left and came back and knocked.

Q. He went out on the porch and turned around and came back and knocked and said something to the effect that, "Don't say anything about it, keep it quiet"? A. That's right.

Q. During all of your negotiations with Mr. Fraser of the insurance company, Mr. Veatch of the insurance company, and Mr. Medlen of the insurance company, did any of them tell you you had to be sure and tell them all the truth and all the facts?

A. No, except Medlen. He says, when he came to my home in December, about December 1st, that was the only time.

Q. That is the only time he asked you to tell all of the truth and all of the facts? [132]

A. That's right.

Q. In other words, during all of this time, had you been answering any questions they asked you?

A. I did.

Q. You had done everything they had asked you to do? A. Yes.

Q. Signed the papers they presented to you?

(Testimony of Billy R. Towry.)

A. Yes. There were meetings called. I had notices to go to them. I went.

Q. You had to take off from work, did you?

A. I did.

Q. You were working for wages, is that right?

A. That's right.

Q. You took off from work and lost pay?

A. I did.

Q. You did everything they asked you, signed answers to the complaints, and appeared at the offices they asked you to appear at? A. Yes.

Q. Answered every question they asked you truthfully? A. Yes.

Q. This question you were asked concerning your drinking of beer at the time of the deposition, that wasn't [133] asked by the insurance company, was it, or any of their representatives?

A. No, not the insurance company. Mr. Medlen is the only one.

Q. Mr. Medlen is the only one that asked you concerning drinking of beer, but that was in December? A. That's right.

Q. But at the time of the deposition, the insurance company didn't ask you whether you had been drinking beer, did they? A. No.

Q. Only Mr. Hollingsworth and myself, is that right? A. That's right.

Q. Whenever the insurance company asked you any questions, you told them the truth, didn't you?

A. I did.

Q. Next in chronological order, you had a meet-

(Testimony of Billy R. Towry.)

ing with Mr. Ellerby, didn't you? A. Yes.

Q. Where did that take place?

A. At the Ventura County Court House. We met at the Automobile Club. We got into his car and drove to the Court House in Ventura County.

Q. How was that meeting arranged?

A. By mail. He had written me a letter. [134]

Q. And asked you to appear at the Auto Club?

A. Yes.

Q. On a certain day at a certain time?

A. That's right.

Q. And you appeared there? A. I did.

Q. Were you to work that day?

A. I was supposed to work that day, yes, but I did not work.

Q. You took off from work to appear?

A. Yes.

Q. And lost some wages? A. I did.

Q. When you got to the Auto Club, who was there?

A. I walked in. I knew Mr. Fraser. I walked in to Mr. Fraser and I believe, Mr. Medlen wrote the letter, he had his name on the letter, saying to meet him there, and I walked in, and I knew Mr. Fraser. I walked in and shook hands and talked to him and he introduced me to Mr. Ellerby, so Mr. Ellerby and I went to his car and went to the court house.

Q. You went up to the court house with Mr. Ellerby? A. Yes.

(Testimony of Billy R. Towry.)

Q. Mr. Ellerby is of Cass and Johansing, isn't he? A. Yes.

Q. When you got to the Court House, what did you do? [135]

A. He asked for a court reporter. They were all in court at that time, and the lady upstairs asked if we would want another reporter, a private reporter, I believe it was, and the lady called Miss Kay Dawson.

Q. This meeting took place about February 28, 1950, wasn't it?

A. I don't recall the exact date on that. It was in February some time.

Q. I direct your attention to Defendant's Exhibit A, the deposition. It is called a "Reporting of Deposition of Billy Ray Towry, February 28, 1950, reported by Kay Dawson." Is that the one?

A. Yes.

Q. While Miss Dawson was coming to the office, you and Mr. Ellerby were alone in the room, is that right? A. That's right.

Q. During the time you were alone in the room, what did Mr. Ellerby say to you with reference to the purpose of your visit?

A. I asked Mr. Ellerby—he introduced himself from the insurance company, and I asked him when the action was taking place, and he said he didn't know. He said, "I have some questions to ask you and," he said, "I want you to answer them true or false." He said, "When the court reporter gets

(Testimony of Billy R. Towry.)

here, will you answer the questions I ask you true or [136] false?"

Q. Did he say anything about limiting your answers just to true or false?

A. He did. He said he didn't need any explanation, just answer true or false.

Q. All he wanted was true or false?

A. To the questions he asked me, he said, "You answer true or false and don't explain it."

Q. And "Don't explain it"? A. Right.

Q. When Miss Dawson appeared, you followed his instructions, didn't you?

A. Yes, I did. We sat at the table in the court reporter's office in the Court House, and he didn't explain anything else. He just said he had some questions to ask me and answer true or false. He said, "We might as well look at the magazines. She might take some time to get here." So we looked at the magazines until she got there.

Q. You didn't try to explain your answers, is that correct? A. No.

Q. In other words, you did everything he told you to do? A. I did.

Q. Did he have that deposition or a copy of it with [137] him at the time you were in the court reporter's office?

A. Well, I didn't see it. But he was reading from—it looked like a deposition with a brown cover on it. I didn't read it.

Q. You didn't read it? A. No.

(Testimony of Billy R. Towry.)

Q. Had you ever read the deposition or a copy of it up until that time? A. No, sir.

Q. Had it ever been presented to you to read?

A. No.

Q. Did you know where to get it? A. No.

Q. Mr. Veatch was representing you, so far as you knew, isn't that right? A. That's right.

Q. And he never arranged to have the deposition presented to you for correction or review?

A. No, sir.

Q. No one did?

A. No one gave me the deposition to read over or anything.

Q. You don't know for sure Mr. Ellerby was reading from that deposition at the time he was questioning you, but you think he was, is that right? [138] A. Yes, sir.

Q. He didn't show you what was said in there, did he?

A. No, sir. He just read the questions, and then he read the answer, and he says, "When I read the answer," he said, "You answer true or false."

Q. Now, then, about the 13th of March 1950, you received some word, did you not, that the company had denied liability?

A. Yes, sir. It was around the 7th or 8th when I received the letter.

Q. 7th or 8th. The letter is dated March 13th.

A. I mean the 17th or 18th. It was along thereabouts. The letter was dated March 13th.

Q. You got it around the 17th or 18th?

(Testimony of Billy R. Towry.)

A. I did.

Q. You had received word in between the time the letter was dated and the 17th or 18th, that they were denying liability? A. Yes.

Q. And during that time did you do anything yourself?

A. No, I didn't do anything. Mr. Medlen says to keep it quiet, not consult with everyone or anyone, and I didn't go to see anyone about it. [139]

Q. You are referring to Mr. Medlen's statement to you in December or late November?

A. Yes.

Q. He told you not to consult with anyone, not to talk with anyone? A. That's right.

Q. And so you were following his instructions, is that right? A. That's right.

Q. What did you do with reference to this?

A. Well, I was on a job. My father came out and said he talked to some lawyers, that he heard some way, I don't know, it sounded pretty bad, they were withdrawing from the case. I hadn't got the letter, I hadn't received the letter yet.

So my father talked to two lawyers about this and they told my father to have me come in to talk to them.

So I figured if I talked to the lawyers, they would know something about it and I went in and talked to the lawyers about it, and that is the first time I consulted anyone about this.

Q. That is the first time you had said anything to anyone about the accident after Mr. Medlen told

(Testimony of Billy R. Towry.)

you to keep it quiet? A. That's right. [140]

Q. At that time when you talked to the lawyers—that was Mr. Willard, wasn't it?

A. That's right.

Q. The gentleman that testified here yesterday?

A. It was Mr. Willard.

Q. At that time he presented or showed to you the deposition or a copy of it, is that right?

A. Yes.

Q. You had not brought the deposition with you, had you?

A. No, sir. I didn't have the deposition.

Q. He got it some way or other, is that right?

A. He had it in his office.

Q. He had it in his office and you read it over at that time? A. Yes, I did.

Q. And did you make your corrections at that time? A. I did.

Q. The first time you read it over?

A. Yes.

Q. Then you signed it before Mr. Fourt?

A. I did.

Q. With reference to this policy of insurance—

Mr. Heily: We don't have that in evidence, your Honor. [141]

The Court: We have a copy of it in the pleadings.

Mr. Wynn: I attached a copy to my answer and there is a copy attached to the Mack complaint.

Mr. Heily: I would like to be sure it is in evi-

(Testimony of Billy R. Towry.)

dence. Will you stipulate the copy attached to the pleadings may be introduced in evidence?

Mr. Wynn: Certainly.

Mr. Heily: For all purposes of the trial of the action. As I understand it, it may be stipulated that the policy which is attached to the answer in the case may be introduced in evidence as the plaintiff's next in order for all purposes of the case.

The Court: It may be received and marked.

The Clerk: Winget exhibit No. 4.

(The document referred to was received in evidence and marked Plaintiff Winget's Exhibit No. 4)

Q. (By Mr. Heily): Mr. Towry, you were charged a premium for that policy of insurance?

A. I was.

Q. Did you pay that premium? A. I did.

Q. Did you ever receive any refund for the payment of that premium?

A. Not that premium, no. [142]

Q. You never received the payment for the unused portion of the premium? A. No, sir.

Q. So the policy remained in full force and effect during all the period that the premium was meant to have applied? A. Yes.

Mr. Wynn: That calls for an opinion of the witness.

The Court: I think it is his opinion as to whether or not it remained in full force and effect. That may go out.

(Testimony of Billy R. Towry.)

Q. (By Mr. Heily): You said you did receive a refund on something else. What was that?

Mr. Wynn: That is immaterial.

The Court: He testified he didn't get a refund on this policy. What difference does that make?

Mr. Heily: I wanted to be sure it was clear.

Q. You did not get a refund on this policy?

A. No, sir.

The Court: May I ask a question?

Mr. Heily: Certainly.

The Court: After you received notice from the insurance company that they denied liability, did they send you a refund at that time?

The Witness: No, sir.

The Court: Or any time thereafter? [143]

The Witness: No, sir.

Q. (By Mr. Heily): At the time of the trial, did Mr. Thompson request you to testify?

Mr. Wynn: There I don't see the materiality, your Honor. This was an occurrence which after the date upon which the insurance company notified.

The Court: Read the question, please.

(Question read.)

The Court: What difference does it make whether he did or didn't?

Mr. Heily: It merely shows cooperation, your Honor. He cooperated throughout.

The Court: The only allegation that the defendants have made in this case that there wasn't any cooperation was the question of drinking. The in-

(Testimony of Billy R. Towry.)

insurance company doesn't contend, never raised the issue that this witness has failed to cooperate in any way except for that one reason. Otherwise, as far as I know, there is no issue here. Objection sustained.

Mr. Heily: Very well, your Honor. I am glad to get that understanding across, too. I believe that's all, Mr. Towry.

Mr. Wynn: May I point out to the jury at this time that the policy of insurance, copy of which has been admitted in evidence pursuant to stipulation, by its terms expired on [144] February 10, 1949.

The Court: Well, it expired after the date of the accident.

Mr. Wynn: That's right.

Redirect Examination

By Mr. Wynn:

Q. Mr. Towry, will you look at the copy of your deposition, which I hand you in the witness box, and refer to page 9, the top of the page. At the time you gave your deposition, was the following question asked you and did you give the answer which I will now read:

“Q. You didn't take a drink all day long?

“A. No.”

Was that question asked and did you make that answer? A. That was the question asked.

Q. And that was the answer you made?

(Testimony of Billy R. Towry.)

A. Yes.

Q. And was that answer true or false?

A. That was false. No hard liquor.

The Court: Just a minute. You mean was it true or false at the time it was given?

Mr. Wynn: Yes, your Honor. I am speaking of the time he gave the deposition.

Q. Then I direct your attention on the same page to [145] lines 6 and 7 reading:

“Q. Had you had any beer that day?

“A. No.”

Was that question asked and was that answer given by you? A. Yes.

Q. And was that answer true or false?

A. False.

Q. And when you were asked whether you had any beer that day and answered falsely, you did not confuse beer with any other kind of intoxicating liquor, did you? A. No.

Q. Now I direct your attention to page 15 of the deposition, reading from line 21:

“Q. Did you do any drinking there?

“A. No.”

Then the following question:

“Q. You didn't drink any beer?

“A. No.”

Were those questions asked you and did you give those answers?

A. Yes. I gave “No” as the answer on there.

(Testimony of Billy R. Towry.)

Q. And was that true or false?

A. That was at the home? The answer to that is "No, not at the home." [146]

Q. Directing your attention to page 26, reading from line 6:

"Q. Did you at any time that day go into the U. & I. Cafe?

"A. No."

Was that question asked you and did you give that answer at the time you gave the deposition?

Mr. Heily: I will object to that question as not within the issues, just in line with what you stated before. Drinking is the only thing that is concerned here. Going into the cafe and by any statements about going into the cafe are not claimed by them as lack of cooperation.

Mr. Wynn: Of course, it appears in the questions and answers specifically——

The Court: Overruled. Do you remember the question?

The Witness: Yes. I did go in the U. & I. Cafe. I answered "No" here, but I believe I was in the U. & I. Cafe.

Q. (By Mr. Wynn): So that the answer given was false? A. Yes.

Q. Then the following question:

"Q. Did you at any time that day have a drink of beer?

"A. No."

(Testimony of Billy R. Towry.)

Was that question asked you and did you so answer? [147] A. I answered "No."

Q. Was that true or false? A. False.

Q. Then the next question:

"Q. Did you at any time that day go to Ziegler's Cafe?

"A. No."

Was that question asked you and that answer given?

A. It was given, "No," and it is false.

Q. That was false? A. Yes, false.

Q. Then the next question, "Did you have a glass of beer in Ziegler's Cafe that day?

"A. No."

Was that question asked you and that answer given? A. I believe that one is "No."

Q. Was that false or true?

A. That is false.

Q. At the time you gave your deposition, you felt that beer was to be distinguished from hard liquor, as you phrase it? A. That's right.

Q. But you understood you were being asked specifically whether you had any beer to drink that day? A. I didn't get that. [148]

Mr. Wynn: May the question be read?

(Question read.)

The Witness: I did.

Q. (By Mr. Wynn): At the time you gave your deposition and before any questions were put to

(Testimony of Billy R. Towry.)

you, did you take an oath to tell the truth, the whole truth, and nothing but the truth?

A. I believe so. I am not sure about that, though.

Q. You recall making the statements you have described on February 28, 1950, under questions of Mr. Ellerby, do you not? A. Yes, I do.

Q. At the time you were asked those questions, you were sworn by Kay Dawson to tell the truth, the whole truth, and nothing but the truth?

A. Yes.

The Court: Before you go into the questions and answers, I notice it is 12:00 o'clock and I think it is time to take a recess.

Ladies and gentlemen of the jury, we are about to take another recess.

Again, it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you. [149]

With that admonition, we will now recess until 2:00 o'clock this afternoon.

(Thereupon, an adjournment was taken until 2:00 o'clock, p.m.)

March 28, 1951; 2:00 P.M.

(The following proceedings were had outside the hearing and presence of the jury:)

Mr. Heily: If the court please, the policy of insurance being now in evidence, I now move to amend the complaint to pray for interest on the full \$32,000 since the date of the judgment. I think in the memorandum filed by me before trial, you gained the impression I did make such a motion.

The Court: Yes. I have read your cases with regard to the interest. I assume the insurance company will object to the amendment.

Mr. Wynn: Yes, your Honor.

The Court: I will overrule the objection and allow the amendment to be made to include the question of interest. That doesn't mean I am allowing interest. I am just allowing the issue to be presented. I don't know what the ruling is going to be, but I want you to have the opportunity to argue you are entitled to interest. I have instructed you as to the amount of recovery.

Mr. Heily: The evidence is in on that point. It is just a matter of argument.

The Court: Call down the jury. Tomorrow morning, I am going to have to go to a funeral. How much longer do you think this case is going to take? [151]

Mr. Heily: I doubt if I will have more than 15 minutes in rebuttal evidence.

Mr. Wynn: I expect to rest upon completing the examination of the present witness with one excep-

tion, your Honor. I have a witness who is a practicing attorney who is in trial, and should he arrive before or after the matter has been submitted, I might ask to reopen.

The Court: How long are you going to want to argue?

Mr. Wynn: I told counsel it was depending on his argument. Not over 15 or 20 minutes.

The Court: I will want to discuss instructions with you. I am wondering if when we finish tonight I can't excuse the jury until 2:00 o'clock in the afternoon and discuss instructions with you at 11:00 o'clock in the morning.

Mr. Wynn: Yes, sir.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: Is it stipulated the jury is present and in the box?

Mr. Wynn: So stipulated.

Mr. Heily: So stipulated.

The Court: Will you come back to the stand, please. [152]

BILLY RAY TOWRY

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Redirect Examination

(Continued)

By Mr. Wynn:

Q. Mr. Towry, how long were you in the Lying-

(Testimony of Billy R. Towry.)

In Hospital following the accident of January 1949? A. Eight days.

Q. During the time you were in the hospital, were you interrogated by any members of the California Highway Patrol?

A. The California Highway Patrol came in——

The Court: Just answer yes or no.

The Witness: Yes.

Q. (By Mr. Wynn): How long after the occurrence of the accident was it you were interrogated by those men?

A. About sometime just shortly after the wreck that night.

Q. So that you did give a statement of what occurred to the California Highway Patrol within a matter of two or three days after the accident?

A. Yes.

Q. And you had given such statement to the Highway Patrol men prior to the date of January 28, 1949, on which the report of accident signed by you and marked Defendant's [153] Exhibit D for identification was signed?

A. Yes, I believe so.

Q. Now, I will ask you to read on the reverse side of Defendant's Exhibit D for identification——

Mr. Heily: I am going to object to any further questions on this line as improper cross-examination.

The Court: Counsel has the right to ask the question. You may object to it being answered.

Mr. Heily: I am sorry.

Q. (By Mr. Wynn): ——the typewritten infor-

(Testimony of Billy R. Towry.)

mation on the reverse side of Defendant's Exhibit D for identification as to the version of the accident given thereon, and ask you whether that is the version you gave to the California Highway Patrol officers.

Mr. Heily: I object as improper examination.

The Court: Overruled. You can answer yes or no.

The Witness: I don't recall what I told the Highway Patrol that night. I just remember seeing them there. I can't say it was even two hours after the accident. I don't know exactly when it was.

Q. You have read, however, from the exhibit now before you the statement as to the occurrence of the accident, have you? A. Yes.

Q. Do you agree with that version of the accident as [154] stated on the exhibit before you?

Mr. Heily: Object to that as calling for a conclusion of the witness.

The Court: Sustained.

Mr. Wynn: May I be heard, your Honor? Now if I may be heard just a moment, we are confronted with an action in which the witness called by us is a party interested in the outcome of the action and definitely interested, and he is a party to the contract. Now, I have called him as my witness by virtue of the fact that under the rulings of the court, the burden is upon me to prove our affirmative defense. That defense is based on what this witness will admit upon examination on the witness

(Testimony of Billy R. Towry.)

stand. I think that he is a party to the action in effect. He is a party for whose interest the action is maintained, in the first place, and, secondly, I believe I am entitled upon it appearing in evidence that the person is an adverse witness in effect, to cross-examine him, although called by me.

The Court: Let me ask you a question. Supposing that this witness had made a statement on which you could rely for the avoidance of your policy to a stranger, not to the insurance company, not to representatives of the insurance company, but to a stranger. Do you think that the insurance company can rely for the avoidance of a policy on a misstatement made to someone else other than the insurance company? [155]

Mr. Wynn: Definitely I do.

The Court: Have you any authorities?

Mr. Wynn: If he made a misstatement to a person entitled to examine him upon it and that misstatement of fact is incorporated—

The Court: Does a highway patrolman have the right, as a matter of law, to examine the—he has the right to ask the question. If the witness doesn't answer, he has no way of forcing the witness to answer. It is purely voluntary. Does he have the right as a matter of law? The Highway Department wasn't representing the insurance company. If they were representing anybody, they were representing the people of the State of California, including this witness.

Mr. Wynn: This is just whether your Honor

(Testimony of Billy R. Towry.)

should declare certain things immaterial after the accident.

The Court: If you have got an authority that says you can rely upon a misstatement made to a stranger, someone that is not connected with the insurance company, I will read it.

Mr. Wynn: I submit the fact that the document containing information passed to the third person was transmitted to the insurance company.

The Court: I am going to have to hold that the representation must be made to the insurance company, and the insurance company cannot rely upon a representation made to a stranger. [156]

Mr. Wynn: Not wishing, of course, to inquire against the court's ruling, do I understand I may not inquire of this witness as to whether or not he did state he had had nothing intoxicating to drink upon being examined by anyone shortly after the accident?

The Court: Unless you can show this was a misrepresentation made to the insurance company or its legal representative.

Mr. Wynn: I offer to prove by the witness on the stand that——

Mr. Heily: If there is going to be an offer of proof, I suggest it be made out of the hearing of the jury.

The Court: Yes, I think your offer should be made outside the presence of the jury. You can wait until the 3:00 o'clock recess. Then I will allow you to make your offer of proof.

(Testimony of Billy R. Towry.)

Mr. Wynn: Very well. No further questions.

Recross-Examination

By Mr. Heily:

Q. You were examined, Mr. Towry, regarding questions on page 9, line 6, of the deposition. I believe you were asked if you had testified—

“Q. Had you had any beer that day?

“A. No.” [157]

You said that was false, is that not true?

A. That's right.

Q. Then you later corrected that to read, “Yes,” is that not true? A. Yes.

Q. And you not only corrected it to read, “Yes,” but you told Mr. Ellerby that it was not true on February 28, didn't you? A. That's right.

Q. And all of these corrections in this deposition were made by you at the time the deposition was first presented to you, weren't they?

A. That's right.

Mr. Wynn: Just a moment. That assumes a fact not in evidence.

The Court: Just a moment. The answer may go out for the purpose of the objection. I might instruct the witness if an objection is made he is not to answer until after the court has ruled upon the objection.

Now, will you read the question, please?

(Question read.)

(Testimony of Billy R. Towry.)

Mr. Wynn: That assumes a fact not in evidence, at the time it was first presented.

The Court: I think you are right, because there is no evidence yet as to when this deposition was presented to the [158] witness. You have the evidence in that the deposition was taken at a certain time. You have the evidence he went to a second place to make corrections. I don't know what happened. Neither does the jury. Was the deposition sent to this witness by mail? Did he pick it up at the office of the court reporter? How did he get hold of it? Did he see it before he corrected it? The objection is good. I sustain the objection.

Mr. Heily: I was under the impression this morning he testified as to when it was first presented to him.

The Court: The only evidence about the deposition is that he took the deposition or gave it, and then some months later he went in and corrected it but as far as I know, there is no evidence as to what happened between those two dates.

Q. (By Mr. Heily): Mr. Towry, the deposition was never presented to you, was it, until you went to the office of Mr. Willard during this period of March 13th to March 20, 1950; is that correct?

Mr. Wynn: I object to that question as leading and suggestive.

The Court: Sustained.

Mr. Heily: This is cross-examination.

The Court: You can ask him when he first saw the deposition after it was transcribed.

(Testimony of Billy R. Towry.)

Mr. Heily: All right. [159]

Q. When did you first see the deposition after it was transcribed?

The Court: Do you know the meaning of the word "transcribed"?

The Witness: Yes.

The Court: When it was written up.

The Witness: Yes. Approximately March, between the 13th and 20th.

The Court: What year?

The Witness: 1950.

Q. (By Mr. Heily): That is the first time you ever saw it to recognize it as a deposition, is that right? A. That's right.

Q. That was where?

A. At the office of Hammons and Willard in Ventura, attorneys.

Q. Did Mr. Willard present it to you to read over? A. Yes, he did.

Q. That is when you made the corrections, is that correct? A. Yes, that is correct.

Q. When Mr. Ellerby was examining you on February 28th, he didn't show you the deposition, did he? A. No.

Q. Now, I direct your attention, Mr. Towry, to page 1 [160] of the deposition, lines 15 to 19. Will you read that over, and I will ask you if you recall that statement having been made? That is 15 to 19, page 1. Do you recall that statement?

A. Yes.

Mr. Heily: I will read it for the benefit of the

(Testimony of Billy R. Towry.)

jury. It is a statement in the deposition of Mr. Towry. "Mr. Veatch:"—

Q. Incidentally, he was your attorney, wasn't he?
A. Yes, sir.

Mr. Heily: Mr. Veatch states: "I think that we might include in the stipulation that he have an opportunity to read over and make any corrections should he choose to do so, and if he does not sign after a reasonable opportunity has been given it might be used without signature; is that satisfactory?"

Q. What was your understanding of that statement, Mr. Towry?

Mr. Wynn: Object to the question.

The Court: Sustained.

Mr. Heily: I believe that's all.

Redirect Examination

By Mr. Wynn:

Q. Mr. Towry, immediately after reading it and making [161] the changes which you made in the deposition, you appeared before Walter J. Fourt and signed the same, did you?
A. Yes, I did.

Q. And Mr. Fourt, now Judge Fourt, at that time asked you if you were changing your testimony in order to make it appear truthful, did he not?

A. Yes.

Q. And you said that that was your desire?

A. Yes.

Mr. Wynn: That's all.

Mr. Heily: That's all.

The Court: You may step down.

(Witness excused.)

Mr. Wynn: Defendant rests, your Honor.

The Court: Subject to the other witness?

Mr. Wynn: A qualification which I will urge upon the court, if necessary, this other witness.

The Court: If you have another witness who comes in, we will allow him to testify.

Mr. Heily: I will call Mr. Mack.

THOMAS MACK

called as a witness on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows: [162]

The Clerk: Will you state your name, please?

The Witness: Thomas Mack.

The Clerk: Is that M-a-c-k?

The Witness: Yes.

Direct Examination

By Mr. Heily:

Q. Where do you live, Mr. Mack?

A. Ventura.

Q. You are the plaintiff in an action against Billie Ray Towry in the Ventura Circuit Court?

A. Yes.

The Court: Will you speak up a little louder, please?

Q. (By Mr. Heily): Calling your attention to about April, 1949, did you have a conversation with Mr. Medlen? A. Yes.

(Testimony of Thomas Mack.)

Q. You are acquainted with Mr. Medlen, who has been here and testified? A. Yes.

Q. And did that concern the accident in question? A. Yes, it did.

Q. What did Mr. Medlen ask you concerning drinking?

A. He asked me if I had been drinking.

Q. What did you tell him?

A. I told him yes. [163]

Q. Did he ask you anything about Mr. Towry?

A. He asked me if he had been drinking.

Q. What did you tell him?

A. Yes, I told him he drank a small quantity of beer.

Q. A small quantity of beer? A. Yes.

Q. Is that all he asked you, concerning drinking?

A. No. He asked me where I was working and how the accident happened, and if I was well taken care of in the hospital, and the approximate amount of my bills, and things like that.

Q. You distinctly remember telling him Mr. Towry had some beer to drink, do you?

A. Yes.

Q. That was in April, 1949?

A. It was in April, 1949.

Mr. Heily: That's all.

Cross-Examination

By Mr. Wynn:

Q. Mr. Mack, you gave your deposition, did you

(Testimony of Thomas Mack.)

not, in the proceeding you brought against Mr. Towry in Ventura Superior Court?

A. Yes, I did.

Q. You were present on the occasion of Mr. Towry [164] giving his deposition in that action, were you not? A. Yes, I was.

Q. You overheard the testimony given by Mr. Towry at that time, didn't you? A. Yes.

Q. And it was a fact that he denied having consumed any beer on the day of the accident, didn't he? A. Yes.

Q. Did you speak up at that time to correct him? A. No.

Q. Did you subsequently contact anyone on behalf of Mr. Towry's insurance company to tell them that that testimony was false? A. No.

Q. To your own knowledge, it was false at the time it was given, was it? A. Yes.

Mr. Wynn: That's all.

Redirect Examination

By Mr. Heily:

Q. You say you did not speak up to correct Mr. Towry at the time he gave his testimony. Where were you at the time he gave his testimony?

A. In Mr. Hollingsworth's office. [165]

Q. Were you present in the same room?

A. Sir?

Q. Were you present in the same room?

A. Yes.

(Testimony of Thomas Mack.)

Q. You had your attorneys there to represent you, didn't you? A. Yes.

Q. It was rather a formal proceeding, as far as you were concerned? A. Yes.

Q. Was there any reason why you didn't speak up?

Mr. Wynn: Just a moment. Any reason why he didn't call for his opinion.

The Court: Will you read the question, please?

(Question read.)

The Court: Sustained.

Q. (By Mr. Heily): Mr. Towry's attorney, Mr. Veatch, was there? A. Yes.

Q. And you had Mr. Henderson and Mr. Hollingsworth representing you, didn't you?

A. That's right.

Mr. Heily: That's all, your Honor. May this witness be excused?

The Court: May he be excused? [166]

Mr. Wynn: Yes, your Honor.

The Court: He may be excused.

(Witness excused.)

Mr. Heily: Call Mrs. Towry.

MRS. RAY TOWRY

called as a witness by and on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, and state your name?

The Witness: Mrs. Ray Towry.

Direct Examination

By Mr. Heily:

Q. Mrs. Towry, where do you live?

A. 120 East Ramona, Ventura.

Q. Are you the mother of Billie Ray Towry?

A. Yes, sir.

Q. I direct your attention to the latter part of November or the early part of December, 1949. Do you recall hearing a conversation between Billie, your son, and Mr. Medlen?

A. Well, he was there, yes.

Q. Did you hear parts of that conversation?

A. Part of it, and part of it I didn't. [167]

Q. Will you relate to us what part you did hear, please?

A. Well, you mean just tell what I heard?

Q. Just tell what you heard.

A. Well, he asked him if he had any beer, and he says now is the time to tell us.

Q. Billy said that, or did Mr. Medlen say it?

A. Mr. Medlen said it.

Q. Mr. Medlen said, "Now is the time to tell us if you had any beer"? A. Yes.

(Testimony of Mrs. Ray Towry.)

Q. What did Billy say?

A. He said, "Well, yes," he says, "I had beer," and he says, "Is that all you had to drink?" And he said "Yes."

Q. Did you hear anything else said then?

A. Well, he said, "Well," he says, "this should be kept quiet."

Q. Mr. Medlen said, "This should be kept quiet"? A. Yes.

Q. Then what did Mr. Medlen do?

A. Well, they talked on, you know, but I didn't pay much attention to what they said. Of course, I noticed that, because I wondered why it should be kept quiet. Shortly, then, he left, went out the door. Naturally, we started talking, you [168] know.

Q. What did you talk about?

A. Well, we said, you know, why he wants it kept quiet.

Mr. Wynn: Just a moment, your Honor. I have no objection to the subject of the conversation, but as to what she said is hearsay.

The Court: Sustained. The last answer may go out.

Q. (By Mr. Heily): Just tell us what you talked about, not what was said.

A. Well, just about what—you know, about him saying it should be kept quiet, that's all.

Q. And then Mr. Medlen came back?

A. Yes. He went out the door and we thought he was gone, that is when we started talking, and

(Testimony of Mrs. Ray Towry.)

he turned around and tapped on the door, and we opened the door and it was him.

Q. What did he say then?

A. He said, "Let's be sure, now, we keep this to ourselves and keep it quiet." I don't know which it was, something like that.

Mr. Heily: You may cross-examine.

Cross-Examination

By Mr. Wynn:

Q. Did Mr. Medlen in connection with advising the matter should be kept quiet, observe that there could be any [169] criminal prosecution against your son? A. Well, I don't know.

Q. You don't know?

A. I don't know what he meant, you know. That is why we started talking about it. We wondered what he meant.

Q. You did not ask Mr. Medlen why he felt it should be kept quiet?

A. No. I never said a word to him.

Q. And no question of criminal prosecution of your son was suggested at that time? A. No.

Mr. Wynn: That's all.

Mr. Heily: That's all. Thank you.

The Court: You may step down.

(Witness excused.)

Mr. Heily: If the court please, the plaintiff rests, and I would like to have these witnesses excused now.

Mr. Wynn: The defendant rests, your Honor.

The Court: You don't think you want to use this other witness?

Mr. Wynn: I am embarrassed, as the court can understand. I would like to use him.

Mr. Heily: May I interrupt, your Honor? I have rested, really, for the purpose of all my witnesses. I neglected to ask to introduce this documentary evidence and I will not [170] rest until I present that.

The Court: Well, better make your offer of introduction, then.

Mr. Heily: At this time, your Honor, I will offer in evidence Plaintiff's Exhibit 1 for identification.

Mr. Wynn: I think that was marked for identification. My objection was to the introduction in evidence.

The Court: It was marked for identification. He is now offering it in evidence.

Mr. Wynn: I misunderstood counsel.

The Court: It is being offered in evidence.

Mr. Wynn: I object to its introduction on the ground that it is immaterial under the decisions of the court in the Valledao vs. Firemen Insurance Fund, 13 Cal. 2d, 322, and Home Insurance vs. Standard Accident Insurance.

The Court: How is that going to establish the fact that the insured either cooperated or didn't cooperate?

Mr. Heily: It does establish it to this extent.

It proves that the falsification was not material in the judgment of the court in Ventura County.

The Court: Now, there was some testimony allowed bordering upon the question of willful misconduct. I don't want this jury to get the idea they are trying that part of the case. That case has been tried. The jury made its decision. It is over with. That question has been resolved. This [171] question, also, has been resolved. What difference does it make?

Mr. Heily: Again, I say the materiality of whether he was drinking or not depends upon what occurred at that trial.

The Court: No. It depends on what he was doing on the day of the accident, not what he did at the trial, but it is what happened the day of the accident that is material.

Mr. Heily: I mean the materiality from the standpoint of whether he has violated the cooperation clause.

The Court: I will sustain the objection. It hasn't a thing in the world to do with this case.

Mr. Heily: I offer in evidence Plaintiff's Exhibit No. 2 for identification.

Mr. Wynn: To which we interpose the same objection, on the same ground as stated to the plaintiff's offer of Exhibit 1 for identification.

The Court: Same ruling.

Mr. Heily: I will now offer Plaintiff's Exhibit No. 3 for identification in evidence.

The Court: You know, Mr. Heily, I don't want this jury to try that other case in any way what-

soever. The issues in that case were presented to an entirely different jury. They came to a verdict. This jury is bound by that verdict. They may not agree. If they had been the jury in that case, they might not have given you a judgment. I don't know. I don't [172] want them to try the other case. I am going to sustain the objection. I don't think this has a thing in the world to do with the case at bar.

I might say if there was any evidence that the insured did not cooperate at the time of trial, it might be a different situation, but the only non-cooperation here is the question of drinking, not at the trial, not what happened when the complaint was filed.

Mr. Heily: Your Honor, I now offer in evidence the motion to dismiss, exemplified copy of the minutes of the Superior Court of Ventura County showing the motion to dismiss, Counts 2 and 3, pertaining to intoxication at the trial at that time, which motion was denied on the objection of counsel for the defendant.

Mr. Wynn: To the introduction of which we object on the same grounds given as to Plaintiff's Exhibits 1, 2 and 3 for identification.

The Court: I don't think this jury is interested at all in the complaint that was filed, the various counts filed, the motions that were made to the court, the rulings of the court, as far as that case is concerned. This jury is only interested in one matter. The jury found in favor of the plaintiff for a certain amount of money. The reason for

the jury's finding, the requests of the court, the motions, the court's rulings, the reasons for denying motions, are absolutely [173] immaterial. Your offer is rejected. The objection is sustained.

The Clerk: Should that be marked for identification, your Honor?

The Court: It may be marked.

The Clerk: Winget's Exhibit 5 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 5 for identification.)

Mr. Heily: Now the plaintiff rests, your Honor.

The Court: You have an offer you want to make?

Mr. Wynn: Yes, I did, your Honor.

The Court: Supposing we excuse the jury until 3:00 o'clock, and in the meantime if your party comes in, we can have the testimony. Otherwise, not.

Mr. Wynn: I have just called my office again through my assistant and he is not available.

The Court: I have some matters I want to discuss with counsel, also, as well as the offer of proof.

Mr. Heily: If the court please, if we are going to hear the other witness, undoubtedly it will be pertaining to statements made, so I will want the witnesses to remain. I notice they are still here.

The Court: All the witnesses will remain subject to call until they are excused after the 3:00 o'clock recess.

Mr. Wynn: Thank you, your Honor. [174]

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, you are not to formulate or express any opinion as to the rights of these parties. This case will not be submitted to you until after the argument of counsel and the instructions of the court, and until the court instructs you, you don't know what the law is applicable in this case. Consequently, it is very important you keep an open mind and not form any conclusions whatsoever. I know it is very easy now, after you have heard all the testimony, to come to some conclusion, either that the plaintiff should recover or that he should not recover; that the defendant is in the right or he is not in the right, but you should keep an open mind and formulate no opinions at all as to the rights of the parties.

We will now recess until 3:00 o'clock.

(Recess.)

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: You can make your offer.

Mr. Wynn: I will recall Mr. Towry to the [175] stand.

BILLY RAY TOWRY

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

Mr. Wynn: I now offer to prove by the witness Billy Ray Towry that subsequent to the date of the occurrence of the accident, on or about January 26, 1949, in Ventura County and prior to the date of January 28, 1949, the witness gave a report to representatives of the California Highway Patrol, in which the witness reported that he had not been drinking.

I think that is the limit of what I could attempt to prove by this witness. The tie-in would be, of course, that the information came to the defendant, but I offer to prove by the witness those facts.

Mr. Heily: In respect to that, first of all, the witness has already testified he doesn't remember what he told the Highway Patrol.

Secondly, it is immaterial, incompetent, irrelevant, no proper foundation, not the best evidence. It is an attempt to impeach his own witness.

The Court: Well, now, your insurance policy provides only, if I can recall the subdivision correctly, that the insured shall cooperate with the company. It doesn't say he shall cooperate with anybody else. It doesn't say he should cooperate with the Motor Vehicle Department. It doesn't say he should cooperate with the police officers. It [176] doesn't say, even, that he shall cooperate with attorneys. It says cooperate with the company. I think

(Testimony of Billy Ray Towry.)

you are bound by that provision. I don't think you can come in and say we can avoid the policy because the insured did not cooperate with a stranger to the action. So I am going to deny your offer of proof.

Mr. Wynn: Very well.

The Court: May this witness step down?

Mr. Wynn: Yes.

The Court: You may step down.

(Witness excused.)

The Court: Now, I have another problem I doubt very much if counsel can give me very much light on. To me it is a very interesting problem. It has to do with the deposition. The deposition shows that these questions were asked by Mr. Hollingsworth. They weren't asked by the insurance company at all. It is true that the insurance company was represented at the deposition.

Can you give me any authorities as to whether or not a misstatement to an attorney in a deposition when attorneys for the insurance company are present is a misrepresentation to the insurance company?

Mr. Wynn: You pose a question I cannot turn to the desk behind me and find a volume and turn to the page so holding, but I will say in reliance on the cases already [177] cited to the court that the truth is what can be and must be expected from an insured. The telling of a falsehood is a falsehood other than one which might be explained by

forgetfulness. The telling of a falsehood goes to the meat of the case, just as in the Valledao case where, as you recall, the insured said, "No, I was not driving the automobile." In fact, he was driving the automobile. The insurance company, upon learning that he had made that false statement, said, "We are through." A judgment was obtained against him and suit brought on the policy.

There the jury enthusiastically found that the plaintiff was entitled to recover, but on motion for judgment notwithstanding the verdict, the court said, "That is a misrepresentation of a fact made to the insurance company or made to people acting on their behalf."

Here is a deposition, a sworn statement of the person insured by my company. He is sworn to tell the truth as though he were in a court of law, nothing but the truth, before a notary public, and he makes a false statement, admittedly false, in his own language. Untrue. He knew it was untrue at the time.

Now you raise the question, the court has raised the question as to the deposition. Can it be said that a man who swears to tell the truth in a deposition, which we know is a proceeding in the action under the law of the state just as [178] much a part of that action as though it were in open court, and he makes that false statement. If I can't rely on that false statement, then I could not say as to any assured sitting on the witness stand sworn before your Honor, who told a lie, that that was any defense.

The Court: That is true, but evidently this witness was called by the plaintiff. He was not called by the insurance company. He was called not by the defendants, but he was called by the plaintiff. It says, "Billy Ray Towry, a witness produced on behalf of the plaintiffs." The insurance company knew of the deposition. They were there as spectators.

Mr. Wynn: And we also know as defendants who are representing the defendant that that fellow is bound by the testimony he gives. Under Section 2055 of the Code of Civil Procedure of the State of California, he is subject to cross-examination and that, your Honor, I say, to me the whole answer is that the deposition proceeding is a proceeding in the Superior Court of the State of California in and for the County of Ventura just as though the man was in court.

Now, when we put a witness on the stand, can I go up and question him and say, "Now, it is true you are a plaintiff in this action. I want to know these things, but it isn't binding on you as plaintiff." Of course it is. Here he was sworn to tell the truth and he lied.

I think in the Valledao case there was a [179] deposition and certainly, if not in that, in the Home Accident vs. Standard Accident, 167 F. 2d, a deposition was given in which these false statements were made. Of course, we have false statements here, referring to the court's ruling as to the assured's report of the accident, we have the written signed statement of July 11, 1949, of the facts. In

the Valledao case and in the Home Accident case, the same thing. In some of those cases, it wasn't blessed by an oath. He simply came into the office of the attorney and said, "This is what occurred." It turned out to be untrue or to be a conflicting statement.

In the Valledao case a deposition was given in which the assured said, "No, I didn't drive the car at all." The deposition obviously was taken by the opposing party. I know of no case in which a defendant can take his own deposition, unless he establishes that his health will not permit his being called into court.

So I say, as far as the deposition is concerned and that statement, it is made to and the insurance company has the right to rely on it as a sworn statement of fact.

The Court: I never heard of the issue being raised before, to be frank with you, but I don't know whether there are any cases on this. It seems to me it is a very interesting point of law.

Mr. Wynn: I am making a note here. [180]

Mr. Heily: I am directing the court's attention to the fact that in Defendant's Exhibit F the company takes the position that by virtue of false testimony, he failed to cooperate.

Mr. Wynn: That was not admitted in evidence.

Mr. Heily: Yes, it is. That is the portion admitted in evidence. That is the only reason they gave for denying liability, false testimony.

Now there is a case, not directly in point, but the language certainly is appropriate, cited in my

memorandum, 26 Southwestern, a Missouri case. The court held that the assureds willingly came to the office of the insured when he requested. He had their deposition taken, and if they were not cross-examined by the insurance company's attorney, it was through no fault of their own. They gave signed statements setting forth their version of how the accident came about. It wasn't held that they wilfully misinformed the attorney of a single fact, nor was there a pretense of any collusion between them and the plaintiff. It is the same situation here.

I think a motion for a directed verdict is in order.

The Court: I think your motion would be denied if you want to make it.

Mr. Wynn: In the interest of thoroughness, I wish again to read from Defendant's Exhibit F, in which counsel reads that the company took the position that it denied responsibility because of false statements in the deposition. [181] May I point out to the court that document likewise charges the assured with false statements made at the time he reported the accident and on July 11, 1949—

The Court: I know it does. What counsel read is only half the story. It is a very interesting matter and maybe over the night you can dig up a case.

Mr. Heily: In that connection, I will make an offer of proof by Mr. Ellerby—

The Court: I don't know what an offer of proof will avail you.

Mr. Heily: Perhaps I will make a motion to reopen in that connection. If Mr. Ellerby is coming down, we can get it directly. I will offer to prove

in connection with a motion to reopen, when Mr. Ellerby was questioned on supplementary proceedings after judgment in this case, he was asked a question, "You say the only reason for denying liability is non-cooperation and the only non-cooperation is his lying about drinking in the deposition?"

"A. That is correct."

The Court: Well, I think it is a question of fact. If you had made a motion, it is denied. I think we will take the recess now. We will recess until 10 minutes after 3:00.

Mr. Wynn: May I interrupt? I take it now I will not be able to produce Mr. Ellerby. My son called and he is still on trial in Burbank, so we will rest. I thought I [182] would mention that if your Honor cares to release the jury and take up matters in chambers.

The Court: No. We will wait until we call the jury out.

Mr. Heily: Shall we dismiss the witnesses?

The Court: Yes, if you wish to.

(Recess.)

The Court: Is it stipulated the jury is present and in the box?

Mr. Wynn: So stipulated.

Mr. Heily: So stipulated.

The Court: Ladies and gentlemen of the jury, we are about to take another recess. It will be necessary to discuss proposed instructions with counsel, and consequently you will not be called

back until tomorrow afternoon. You will be excused now until tomorrow afternoon at 1:30. Suppose we say 1:30?

Mr. Wynn: All right.

The Court: In the meantime, you are not to talk with anyone about this case, you are not to allow anyone to talk to you about it, you are not to formulate or express any opinion as to whether the plaintiff is entitled to judgment or the plaintiff is not entitled to judgment, whether the equities are with the defendant or they are not with the defendant. In other words, you are to keep an open mind until this [183] case has been finally submitted to you. This case will not be submitted to you until after the argument of counsel and the instructions of the court sometime tomorrow afternoon. With that admonition, you now may be excused until 1:30 tomorrow afternoon.

I will see you gentlemen in chambers at 11:00 o'clock in the morning.

(Whereupon, at 4:15 o'clock p.m., an adjournment was taken until 11:00 o'clock a.m. Thursday, March 29, 1951.) [184]

March 29, 1951—11:00 A.M.

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: Have you got your instructions?

Mr. Heily: Yes, sir.

The Court: I will take your instructions and I will tell you the ones I propose to give, and then

we can discuss them. I propose to give Defendant's Exhibit No. 2.

Mr. Wynn: Just a moment. I have three sets here.

The Court: Well, forget Mack. Get Defendant's No. 2. There is nothing wrong with that.

I propose to give Plaintiff's No. 2 and Plaintiff's No. 3; Plaintiff's No. 4; Defendant's No. 4; Defendant's No. 6; Defendant's No. 20; Defendant's No. 19; Defendant's No. 18; Defendant's No. 17; Defendant's No. 8; Defendant's No. 9; Defendant's No. 7; Plaintiff's 8; Plaintiff's No. 9; Plaintiff's No. 10; Plaintiff's No. 15; Defendant's No. 11; Defendant's No. 12; Defendant's No. 14; Defendant's No. 15; Defendant's No. 16; Plaintiff's No. 16.

Here is an instruction that hasn't been numbered, I think, which sets forth the Subsection 8 in toto. There is a copy for each of you.

For the purpose of clarity, let's make that Instruction 8 so that we can discuss them by [186] number.

This one is Instruction B. It is one of the Mack instructions, except it has been changed in a little particular, not very much, but a little. If you have any objection, we might discuss these as we go along.

Mr. Wynn: Could your Honor indicate which instruction in Mack B is?

The Court: I cannot tell you.

Mr. Heily: I don't see any objection to it.

The Court: I had it marked. I expect I can tell you which it is. I think they are still marked. The

first instruction was Mack 4 and the instruction B is Mack 5.

Mr. Wynn: I have no objection to Mack 4. Mack 5 wasn't requested by anyone. That is why I don't have it here before me.

The Court: In the Federal Court, the court gives the instructions. The fact of the matter is Judge Mathes gives his own instructions.

Mr. Wynn: And he makes his own findings.

The Court: He writes his own instructions. Well, now, Instruction C, there is a copy for each of you, and that is Mack 6. That is an instruction about how a deposition is taken.

Mr. Wynn: I have no objection to it.

Mr. Heily: I wonder if you wouldn't add in there Thomas B. Mack and Vivian Delozier had the deposition taken? [187]

The Court: This deposition was taken in the case of Mack vs. Towry and also in the case of Winget vs. Towry. Maybe that should be changed from Thomas B. Mack to Winget. I think that we will change that. Filed in the State court by Vivian Delozier. We will correct that.

Mr. Heily: And then you strike out Thomas B. Mack?

The Court: Yes. In the action filed in the State court by Vivian Delozier and the deposition of the defendant Billy Ray Towry. Anything wrong?

Mr. Wynn: I suppose we should say, "Now known as Vivian Winget."

The Court: All right. That is C.

Now, D is the section of the code about the taking of depositions. That was Mack 7.

Instruction E is Mack 9.

Mr. Wynn: I have some matters on that.

The Court: Some objections? All right.

Mr. Wynn: This instruction in effect tells the jury that the repeating or the telling of a second story as to occurrences cures any lack of cooperation in previously telling the first story. This is what occurred in the Valledao and Home case. I am reading from my notes on which I am basing my objection. This Instruction E now informs the jury that if the jury believes that after Towry had given his deposition, he told the Standard Accident Insurance Company [188] that the story in his deposition was false, the jury might take that into consideration in determining whether he acted in good faith in his dealings with the company or whether he violated the cooperation clause.

This is in effect my objection. It says to the jury no matter if a person made a statement of a fact, if he subsequently tells the insurance company that that statement was a false one, that he cures the——

The Court: No. It says the jury may take into consideration. It doesn't say it cures it. The jury may take that into consideration in determining whether or not he violated the cooperation clause. I don't tell them to take into consideration or don't tell them it is a cure. I say they may consider it. Isn't that the question of fact here?

Mr. Wynn: My argument and my objection to this instruction is based upon a contention that in

both the Valledao and the Home Insurance Company cases, that is precisely a matter which it is there held is not a question of fact for the jury, but is a question of law for the court. That is the basis for the objection.

Mr. Heily: I disagree with that.

The Court: If that was a question of law——

Mr. Heily: The distinction between this Valledao and Home case and this case lies in this. In those cases the question of cooperation had been determined beforehand. [189] Whether or not they had cooperated had already been determined, and it was determined that they had not cooperated. The only question in those cases was whether a prejudice had to be shown or whether it would be presumed in law on the facts, and those cases dealt almost entirely with the matter of prejudice.

The Court: If it was a question of law whether or not the insured cooperated, we wouldn't need a jury in this case at all.

Mr. Wynn: Quite so. We will get to that.

The Court: There is no question about that. I think E is satisfactory. I see nothing wrong with E.

Now, F is Mack's 10.

Mr. Heily: That would be the same as E, insofar as argument is concerned.

The Court: Same argument?

Mr. Wynn: Somewhat the same. I object in the first place to this instruction being given in the manner it is, including the words, because of the words "correcting" in line 1 and "correction" in

line 7. I submit it should be changing. He changed his deposition in those two respects.

The Court: Let's look at that just a minute and go back to the code section. "When completed, it must be carefully read to and by the witness and corrected," not changed. It says "corrected." [190]

Mr. Wynn: That in effect is saying to the jury what he subsequently told is the truth, and who knows whether it is right or wrong? He told two stories and he changed his testimony.

The Court: But the statute provides that the deposition shall be corrected. If the statute provides it shall be changed, that is another thing. This follows the word of the statute.

Mr. Heily: Changing and correcting, so far as I can see, are synonymous.

Mr. Wynn: But that is not the principal objection to this.

The Court: All right.

Mr. Wynn: As I read this instruction, it in effect tells the jury that it might take into consideration the fact that the insurance company knew of a change in the story. "The jury shall take that into consideration in deciding whether he originally testified that he had been drinking." That doesn't make sense to me. He didn't so originally testify.

The Court: I am wondering about the instruction myself. There is a case I read which holds that the insurance company did not have to rely upon the statement in order to avoid the policy.

Mr. Wynn: But, you see, as this reads, your Honor read [191] the last four lines, whether or not

the insurance company relied upon the fact that in originally giving his testimony, Towry testified he had been drinking some beer, and that is not the fact. When he originally testified, he did not do that.

The Court: I think this instruction may be objectionable, so I am going to refuse to give Instruction F.

Now, G is Mack 13.

Mr. Wynn: My only objection to that instruction was that the instruction is wholly immaterial, there being no question but that the insurance company did learn of the conflicting stories through the only people a corporation can, its agents or attorneys.

The Court: There is no question of agency. They are not denying it on that ground. They haven't even said, "We are not responsible because we didn't know." I see nothing wrong with the instruction, but it is inserting an issue that is not before the jury.

Mr. Wynn: That's right.

The Court: G will be refused.

H is No. 15.

Mr. Wynn: Shall I speak?

The Court: Yes.

Mr. Wynn: My objection to Mack 15 in the proposed Instruction No. H is that it improperly tells the jury that the [192] jury may consider the subsequent correction of a false statement in showing whether he made a false statement. As this reads, about the middle of line 11 or 12, "I instruct you you may take the fact of such disclosure, if

it be a fact, by Towry, of drinking of the beer and in subsequently correcting his deposition, to determine whether or not he made any willful, false or deliberate misstatements."

Now, is it proper to say to a jury, "You may determine that because the man subsequently said what he originally said is false, you can determine that he did not willfully make the original misstatement"? That is the way I read this, and in effect it says to the jury, "You can decide if he corrected his testimony or corrected his statements, you can consider that correction in determining whether he originally made a false statement."

Mr. Heily: I think that the issue here is whether he made a material false statement, and in determining whether it is done willfully and deliberately, they must take into consideration the facts surrounding the making of it, and among those facts are the correction of it.

The Court: I would hold with the defendant on this instruction, if it was not for one thing. Was it stipulated that the deposition could be used by the parties in this case?

Mr. Wynn: Stipulated that the deposition could be used by the parties in this case. [193]

Mr. Heily: Yes.

The Court: Was it stipulated this deposition could be used?

Mr. Heily: In evidence in this case?

The Court: In evidence in this case.

Mr. Heily: Yes.

Mr. Wynn: I don't recall such a stipulation. I recall the reading of various portions of the deposition, including the——

The Court: I assume if it was stipulated the deposition could be used, there was also an implied stipulation that the deposition had been taken properly and signed properly. Now, I am just wondering, if there had been any objection raised to the use of the deposition, whether I was correct in allowing the deposition to be used, because whoever took this deposition doesn't know anything about taking a deposition. Now, if the deposition had been taken and it followed the procedure, that is, if they had taken the deposition and within a few days or weeks had presented this deposition to the witness for signature, and then he had made the correction, then I would feel that the instruction was proper, but here we have got a wait of a year, practically speaking, because as far as the evidence shows this deposition was not sent to the witness. It was not taken to the witness. He was called into the attorney's office before someone who did not take the [194] deposition, and then he read the deposition and made the correction. That is not what the statute says you can do.

The statute says it should be corrected before the one who takes the deposition, and that party should initial it. There is no initialing as far as the notary is concerned. I think the deposition certainly is subject to a lot of criticism.

Now, if this correction had been made promptly, then I think that this instruction would be proper,

but inasmuch as it is a year later, then I think it is wrong to say to the jury, "You may consider the correction made a year later as some evidence of whether or not it was willful, false and deliberate when it was made a year before."

Mr. Heily: It wasn't a year later. It was approximately four and a half to five months later.

Mr. Wynn: Between the original taking of the deposition and the time he signed, approximately five months. Between the time he signed it and the corrections made or the changes made, and the original statement contrary to fact in July, 1949, approximately nine months.

The Court: Well, I think there has been such a delay here that if this had been prompt, I would have given the instruction. Inasmuch as it was not prompt, I am going to refuse H.

Mr. Heily: Would it be a fair consideration to instruct [195] the jury somewhat in this manner, then, "You are instructed you may take into consideration the fact that the attorneys for Towry did not present the deposition to him for correction"?

The Court: No. There is no evidence in this case as to why—I raised that issue during the trial. I wanted to know the reason. I was interested in knowing the reason why.

Mr. Heily: It isn't the reason why, is it, so much as the mere fact that it was not presented to him?

The Court: Somebody slipped up on this. I assume it was the notary that didn't follow through.

Of course, I think the attorneys for the plaintiff should have seen that the notary did follow through.

I don't think Hollingsworth is absolved from blame, because Hollingsworth was the one who was causing the deposition to be taken. He should have seen the the deposition was taken properly and was presented promptly, was signed and corrected.

Mr. Wynn: Just a comment. Everyone has been faced with that sometime or other, and you sometimes find a deposition you have taken has never been signed, and where is the witness? You kick yourself.

The Court: You might have been in a very difficult place here if you had relied upon the deposition and then you could show it wasn't signed before the notary taking the [196] deposition and corrected. But I think there was a stipulation the deposition can be used and that stipulation cured the defects of the taking. I don't know.

Instruction I is Mack 16.

Mr. Heily: H is disallowed?

The Court: Yes.

Mr. Wynn: Well, my note originally was that this instruction was not applicable, but I suppose I am wrong. I mean the instruction, "If you believe he did not violate the terms of the policy, your verdict should be in favor of the plaintiff."

The Court: Isn't that the whole issue here?

Mr. Wynn: I suppose it is, yes.

The Court: If they decide this case on any other issue, I will set the verdict aside. That is the

whole issue, the issue of cooperation. I was afraid yesterday you were going to get trying the other lawsuit all over again.

Now, J, that is Mack 17.

Mr. Wynn: I have no objection to that. The only thing I have marked was Mack, and you have changed that to plaintiff.

The Court: Yes. That is why I rewrote these. K is 18. When I passed on this, I had read some of these cases that were suggested, and there is a case to the effect that the insurance company doesn't have to show it was prejudiced, if it [197] was a deliberate misstatement. I don't think the company has to show it relied upon that misstatement or was prejudiced by the misstatement. There is a case to that effect.

Mr. Wynn: My objection to this instruction was, "prejudice and matter of law." That is the very case which was cited by Mack in support of this instruction, that *Valladao vs. Firemen's Fund*, 13 Cal. 2d. Likewise the decision of the Ninth Circuit in the *Home Insurance Company* in 167 F.2d, 919. That prejudice was a matter of law and, of course, your Honor, based on those cases, that it is a matter of law and the decisions in those cases, that the false statement of a fact material to the accident is as a matter of law prejudice, and the *Valladao* case supported the judgment notwithstanding the verdict.

The Court: I am going to refuse K. I want to be very careful here, if I can be careful, because if

the plaintiff gets a verdict, I don't want a reversal on appeal. That was K. This is L. L is 21.

Mr. Wynn: Shall I just speak up?

The Court: Yes.

Mr. Wynn: My objection is, specifically, the words "unintentional and accidental" in line 7. My note is that under the evidence, the undisputed evidence, it cannot be said that his statement that, "I did not drink any beer on that date," was unintentionally made or accidentally made. The [198] only evidence is that that was a false statement and admittedly false, so here, to tell the jury that any statements which were unintentional and accidental are not violative of the policy, is instructing on a matter which is not within the evidence, the only evidence being that he did intentionally make a false statement.

The Court: If it was not for the question of beer, I would overrule you, because he testified he didn't think that beer was hard liquor, but the question was asked about beer particularly. There is no question about that.

Mr. Wynn: And the question was asked, "Did you go into a specific cafe?" and he said, "No." So I say that there was no evidence that the statements were unintentionally made. He may have thought it didn't make any difference.

Mr. Heily: Your objection is based on a false premise. There is no evidence on which it can stand, and there is this evidence concerning the statement which said, "I did not use any intoxicating liquor." The evidence shows he meant hard

liquor, not beer, and that was an unintentional statement.

The Court: But your proposed instruction doesn't restrict itself to one instance.

Mr. Heily: It says any.

The Court: It says any. I think the objection is good. I am going to refuse L.

Now, if we will get back to the plaintiff's [199] instructions, does the defendant have any objection to the proposed plaintiff's instructions I have indicated? We are not talking about the instructions I have refused, but the ones I have indicated I will give. Let's take up the plaintiff's instructions first.

Mr. Wynn: The first one I wished to comment on is plaintiff's No. 9.

The Court: All right.

Mr. Wynn: "As to what constitutes lack of cooperation, the jury is instructed that to prove it, the insurance company must show there is a failure to cooperate in a substantial material respect, and that a technical or inconsequential lack of cooperation then on a misstatement of fact is immaterial." I do not think that correctly expresses the law, the jury being told that a misstatement of fact to the insurance company is immaterial.

Mr. Heily: Let's amend that to insert before the word "misstatement," "technical or inconsequential."

Mr. Wynn: Then that is a duplication.

Mr. Heily: It is a matter of phraseology, as far as I can see.

Mr. Wynn: I suggest that I felt defendant's instruction No. 12——

The Court: Why can't we stop after the word "respect" on line 5? "The company must be sure that there is a failure [200] to cooperate by Towry in some substantial and material respect."

Mr. Wynn: I think so.

Mr. Heily: I think the jury has to know the difference between a material and immaterial thing there.

The Court: I don't know. The jury may come to a different conclusion than I do. I think it is immaterial. The jury may think it is material. I don't know how you define material.

Mr. Heily: That is what we are trying to do in accordance with the law.

Mr. Wynn: If it is fair to refer to defendant's 12 to save time——

The Court: Defendant's 12?

Mr. Wynn: It follows very shortly.

The Court: I don't want to make any duplication, if I can help it, because I think a jury does pretty well to keep track of what it gets.

Mr. Wynn: In 12, I ask for the instruction to the jury to determine whether Towry made misrepresentations of facts to this defendant concerning the accident or the surrounding circumstances which were not mere matters of opinion or which were not of such a nature as to be excusable upon the ground of forgetfulness or mistake.

Mr. Heily: That would amount to a directed verdict. [201]

Mr. Wynn: He has the technical or inconsequential, and the misstatement of fact. Now, if a man would be asked, "When were you born?" and he should say, "December 25, 1908—no, I am wrong in that. I meant 1906," that might be technical or inconsequential. Such misstatements, it is true, are not good to void a covenant, but here in No. 9 as requested, the jury is told that a misstatement of fact is immaterial.

Mr. Heily: No, they are not told that.

The Court: No. In some material respect.

Mr. Wynn: And that an inconsequential——

Mr. Heily: Just add the words "technical or inconsequential" before "misstatement" and your objection is answered.

Mr. Wynn: Then No. 15, your Honor, reading, "In order for a falsification to constitute non-cooperation, you are instructed that the falsification must be willful, deliberate and concerning a material fact," I have no objection to that, but in No. 9 they say, "A misstatement of fact is immaterial."

Mr. Heily: Inconsequential and technical misstatement of fact is what we are saying, and that is the law. That is definitely the law. If there is any concern about the way the language is written there, out of an abundance of caution, I am suggesting before the word "misstatement" in line 6, the words "technical or inconsequential" be inserted, and that will take care of your objection entirely. [202]

The Court: Let's see. Is this satisfactory?

As to what constitutes lack of cooperation in this case, you are instructed that to prove there is a lack of cooperation, the Standard Accident Insurance Company must show there is a failure to cooperate by Towry in some substantial and material respect. You are further instructed that the misstatement of fact made to the insurance company, if you find it was so made, must be material.

In other words, I agree that the insurance company should not avoid its liability upon some technical or inconsequential ground, so I say it must be a material matter. Doesn't that meet your objection?

Mr. Wynn: Yes. I would then say it is duplicated by Instruction No. 15. I am not trying to be capricious.

The Court: I am going to give No. 9 as amended. Fifteen states it a little different way. Any other objection?

Mr. Wynn: No. 10.

The Court: Do you want the record to show you object to 9 as amended?

Mr. Wynn: I object to 9 and 15 as being duplicates.

The Court: All right. The next is No. 10.

Mr. Wynn: No. 10 is based on Pacific Indemnity vs. McDonald, a case arising in Oregon, the decision itself being expressly based on Oregon law. The court pointed out that the law in Oregon must be decisive. The record shows that the [203] delay in that case in correcting or changing the original statement made to the insurance company was one

week only, from August 15th to August 22nd, or the 18th to the 25th. The decision expressly distinguishes the Pacific Indemnity Company vs. McDonald case from another Oregon decision, the citation of which I can't give you, but it is in 107 F. 2d.

The delay had been months in correcting, and in the Pacific Indemnity vs. McDonald case, the court says in so many words, had there been a long or longer delay in correcting the misstatement, plaintiff could not recover under the ruling in the Kimineta case, another Oregon case. I have the citation here.

To tell the jury in this case that the prompt withdrawal of a falsehood cures the defect is to suggest to the jury that the court feels that a withdrawal five months later is a prompt one.

The Court: Of course, we have got that question again. Here is this witness, who never had a deposition taken before. He was called in to take his deposition. He knew nothing about the procedure.

Mr. Wynn: He was sworn to tell the truth.

The Court: He was sworn to tell the truth. Now, the statute provides that when you provide that he can look at his deposition and correct it. I don't know when the misstatement is made, when it was taken by the reporter or when [204] it was corrected. I don't know what the law is. I don't know whether or not until he has the opportunity to correct it, there is a misstatement.

Mr. Heily: The evidence is as early as 10 days after the deposition, the insurance company knew of the misstatement.

The Court: There is no question here. This

raises the question about prejudice to the insurance company, whether the insurance company was prejudiced. I think the rule is if there is a deliberate misrepresentation or misstatement to the insurance company, that the insurance company doesn't have to go on and say it is prejudiced by that misstatement.

Supposing you take a deposition today and there is a deliberate misrepresentation. The insurance company goes ahead and the trial is not for two years. Now, can you say that the insurance company has to show it was prejudiced within two weeks or three weeks?

Mr. Heily: I think you have to, yes.

The Court: I think 10 is objectionable. I am going to refuse 10.

Mr. Wynn: No. 15, I have no objection to, except as stated in connection with 9, that it is a duplication.

The Court: I will overrule the objection on 15.

Mr. Wynn: I have no objection to No. 16.

Mr. Heily: Then that is all. [205]

The Court: Now, has the plaintiff any objection to the defendant's instructions?

Mr. Heily: No. 2 is all right.

The Court: The defendant gives the California jury instructions. The only question is whether or not they are applicable in the case.

Mr. Heily: No. 4 is okay. Six is all right. Twenty is all right. Nineteen is okay. Eighteen is okay. Seventeen is okay. Eight is okay. Nine is okay. Seven is okay.

Mr. Wynn: As a matter of fact, my 7 and your 8 are based on the same form. I think they are both proper. The question is whether both should be given.

The Court: I don't like to give more instructions than necessary. I think the jury has plenty to do if they can keep track of the instructions given, and if there is any duplication here, I want to cut it out.

Mr. Heily: I think either one can go out.

The Court: Which are they?

Mr. Wynn: Defendant's 7 and plaintiff's 8. My form is a slightly longer statement. They are both directed to the same thing.

The Court: You say your 7?

Mr. Wynn: Yes.

Mr. Heily: And my 8.

The Court: I think I will eliminate the longer one, [206] which is the defendant's 7.

Mr. Wynn: Yes. I will put on here "covered elsewhere."

The Court: Now, do you want to make a note of the instructions I am going to refuse to give or I have indicated I am going to refuse?

Mr. Heily: Let me finish first.

The Court: I thought you had finished. Excuse me. I don't want to hurry you, or anything like that.

Mr. Wynn: No. 11 should be corrected in line 2 to say, "this action is," rather than, "these actions are."

The Court: Which one is that?

Mr. Wynn: My No. 11.

The Court: Defendant's 11. "Upon which this action is brought." That shall be corrected by changing the words "these" to "this" and "are" to "is."

Mr. Heily: I would like to leave my discussion of that one until I finish the rest of his and combine it with something else I have in mind.

The Court: Go ahead.

Mr. Heily: No. 12 of the defendant, I object to on the grounds it gives the implication of a directed verdict. It states, "It is your duty to determine whether or not misrepresentations of facts to this defendant are not mere matters of opinion, which were not of such a nature as to be excusable on the ground of forgetfulness or mistake." That is covered [207] by other instructions on materiality.

The Court: I gave your instruction that is comparable to this.

Mr. Heily: Yes. I say it is covered by mine and this, I think, has a tendency to confuse the jury and give them the impression that they must, and if they determine that he did make a falsification, they must find in favor of the defendant, and it is admitted he made a false statement.

The Court: I don't agree with you at all. I am going to overrule the objection.

Mr. Heily: I object to 14 on the same ground. That is in the nature of a directed verdict. They must take into consideration the circumstances, as well as the truthfulness or falsity of his statements.

The Court: That is pretty nearly the words of this federal case. I read that federal case.

Mr. Heily: The words out of the Oregon case are the words for that case.

The Court: We are not bound by Oregon, but we are bound by the Federal Reports. I will overrule the objection on 14.

These cases repeat and repeat and repeat that truthfulness is the keystone, and I have instructed it must be material, so I think 14 is all right.

Mr. Heily: No. 15, I object to on the ground they must [208] consider for the purpose of determining whether the statement was material or not the facts surrounding the actual trial of the case.

The Court: Nothing that happened after the case started could affect this problem, could it?

Mr. Heily: It could determine whether the statement was material or not. I have maintained that throughout.

Mr. Wynn: That is 15?

The Court: That is 15.

Mr. Heily: The disclaimer of liability is on the grounds of a material falsehood. "To determine whether it is material, you must find"——

The Court: There is one question I am wondering about. You contend it is disclaiming your responsibility. You attempted to disclaim your responsibility. In other words, the trial judge in the Superior Court wouldn't let you terminate your responsibility, and you are even here attempting to disclaim your responsibility. This may be objectionable, because it may lead the jury to the conclusion you have disclaimed your responsibility.

Mr. Wynn: Well, of course, I had a little trouble phrasing this. I first phrased it, "until March 13, 1950, upon which date the defendant Standard Accident delivered to the assured its notice that it disclaimed any responsibility."

Then I thought, no, that is instructing upon [209] facts which may not be in evidence. So I said, "Its disclaimer, if you find that the defendant made such disclaimer."

Mr. Heily: I don't think you can limit it to that point. The disclaimer itself indicates you still had to withdraw, and you actually didn't get withdrawn.

The Court: I don't think it is an issue in this case whether or not you did disclaim. You are still here. You might have disclaimed.

Mr. Wynn: I was going to make that same comment, too.

The Court: You are still here, at least in this trial court, and this court feels you are still here. I hope you are still here. I think maybe the objection is good. I will refuse 15.

Mr. Heily: No. 16, I make the same objection.

The Court: 16 only says, "You are not to speculate," and I think that is the law. I will overrule your objection on 16.

Mr. Heily: Then we come back to 11. I would like to have you look at my 13 which you are not going to give.

The Court: 13 that we are not going to give?

Mr. Heily: Yes. My 13 is definitely the law. "If the insurance company improperly demands information"——

The Court: There is nothing in this case to indicate there has been an improper demand. You may argue the representative of the insurance company suggested this thing be [210] kept quiet.

Mr. Heily: That is the basis on which the law is the insurance company cannot present a sham or false defense.

The Court: I know, but that is only one of these instances. You have got a lot of instances here in which there is no question of an improper suggestion. I think my ruling on 13 is proper.

Mr. Wynn: I do, too. That would be dangerous.

Mr. Heily: Then I think we should add before the word "demanded" in line 6, the word "improperly demanded."

The Court: There is nothing in this case to show the insurance company has ever improperly demanded anything.

Mr. Heily: Yes, there is. The evidence that the insurance company advised him to keep quiet.

The Court: Advising and demanding are two different things. It may be you have some evidence that there was a suggestion on the part of the adjuster that it be kept quiet, but there is nothing to say they demanded it.

Mr. Heily: Then I think we should have an instruction that would cover that very situation, something to the effect that, "You are instructed if the cooperation of Mr. Towry was improperly advised or suggested"——

Mr. Wynn: But there is no assertion that he——

The Court: I am going to give 11.

Mr. Heily: Without the amendment? [211]

The Court: Without the amendment.

Mr. Heily: Then I think I should have an instruction in there that if there was any evidence that it was improperly suggested to him that he withhold information, they should take that into consideration.

The Court: The main issue here, as I see it, is what happened at the time the deposition was taken, and this suggestion came up a long time later.

Mr. Heily: About a month later.

The Court: All right. The fact that a week after he made these statements somebody suggested he shouldn't change his testimony certainly doesn't throw any light on whether it was willful, deliberate or intentional.

Mr. Heily: I think it does.

The Court: I am going to overrule the objection. For the purpose of the record, do you have any objection to the instructions that I have indicated I am not giving that you have requested?

Mr. Heily: That one, No. 13, I object to that.

The Court: I want you to make your record of your objections now.

Mr. Heily: I object to it as not being given, because I think it is a fair and honest statement of the law as it applies to this case.

The Court: All right. Do you have any [212] other objections?

Mr. Heily: To those you are not giving?

The Court: Yes.

Mr. Heily: Other than what I have already voiced?

The Court: Yes, the ones I have indicated I am not going to give, not the ones I indicated I was going to give, and then struck out, but the ones I eliminated originally.

Mr. Heily: Yes. I object to failing to give No. 11 following the language in *Rockmiss vs. New Jersey Manufacturers Association Insurance Company*.

The Court: You can have your objection.

Mr. Heily: I object to your not giving No. 12, also.

The Court: You can have your objection on 12.

Mr. Heily: There is evidence showing he did not ask him concerning beer, and under that case the insurance company cannot complain that that is non-cooperation.

I believe No. 14 is covered by the quotation from the statute, isn't it?

The Court: Yes. I have given the statute itself. I think that is the proper way to do it, rather than an opinion as to what it says. I don't think your 14 is proper, because you can take a sworn statement and then you can stipulate it can be used.

Mr. Wynn: Those are the notes I had.

The Court: Why, surely. You may be right as far as you [213] go, but you don't go far enough.

Mr. Heily: That's all.

The Court: Now, do you have any objections to the instructions I have refused to give of yours?

Mr. Wynn: Yes. My proposed instruction No.

10, which is intended to be only a statement of the law that the plaintiff in this action stands in the shoes of Towry, and any defense available against Towry is available against the plaintiff, that is the gist of it. I don't see that that is covered by any other instruction given.

The Court: Maybe counsel will agree that is the law, that one who attempts to recover from an insurance company does not stand in any better position than the insured.

Mr. Heily: I don't think it is in issue here at all. It is certainly the law.

Mr. Wynn: I think it is only safe to tell the jury, knowing as we know how juries sometimes get a different idea.

The Court: You don't know what a jury uses to decide a case.

Mr. Wynn: I tried to explain it to my son yesterday, and he couldn't see why they are suing again when they have already sued, and I had to explain they can only recover in the position of Mr. Towry.

The Court: But here is the vice of your instruction. This jury might feel that Towry shouldn't recover on wilful [214] misconduct. However, they may not feel a third party may not recover. In other words, Towry, you have alleged and you have got in the record now that there was this issue of wilful misconduct. Now, they may feel Towry shouldn't recover. They may feel they wouldn't give a judgment to Towry. But here is a stranger.

Mr. Wynn: And that is just what the law says,

that that poor stranger is tarred with the same brush that tars Towry.

The Court: I am inclined to believe that a stranger cannot have any more rights against an insurance carrier than the insured himself. The only question is whether it is material.

Mr. Wynn: Is it material to advise the jury in this case that that is the situation?

The Court: Of course, if I am going to err, I would rather err in giving the instruction than in keeping it out.

Mr. Wynn: I don't feel strongly about it, except I do believe that is the law and I think it would be well for the jury to know that.

The Court: I am going to still hold to my guns. I don't think it is a material issue here, although I think it is a correct statement of the law but, nevertheless, I don't think we should present to this jury a lot of correct statements of law on matters that are not of importance. [215]

Mr. Wynn: My next and last is No. 13. In that I am admittedly making a request for an instructed verdict.

The Court: That is the thing I would certainly lean over backwards not to give.

Mr. Wynn: I am asking the court to instruct if they would find he did make a deliberate misrepresentation as to consuming liquor, that is prejudicial as a matter of law and there can be no recovery.

The Court: I am going to refuse to give it.

Mr. Wynn: That's all.

The Court: If we were trying this case without a jury, I don't know, we might have to decide the case in a different way. That's all. We have got an hour now.

(Thereupon, a recess was taken until 2:00 o'clock, p.m.) [216]

March 29, 1951—2:00 P.M.

(The following proceedings were had outside the hearing and presence of the jury:)

Mr. Wynn: If the court please, counsel on behalf of the defendant Standard Accident Insurance Company wishes at this time to move the court for its order directing the jury in this cause to return its verdict for the defendant. This motion is made upon the following grounds:

One, there is no conflict in the testimony or arising from the evidence introduced in this action on the issue as to whether or not the assured under the policy issued by the defendant made conflicting statements of fact to the insurance company. It is, in fact, conceded that the insured did make conflicting statements.

Apart from the concession, I direct the court's attention to defendant's Exhibit D, I believe, which is the statement of July 11, 1949, in which the assured stated over his own signature that he had drunk no intoxicating liquor on the date of the accident.

Secondly, where there is no conflict or no substantial conflict in the evidence introduced in an

action seeking recovery upon an insurance policy, a public liability insurance policy, as to the facts concerning the representations made, the matters of materiality and of prejudice to the [217] insurance company, are purely questions of law, not for submission to a jury, but for decision by the court. The authorities I wish to refer to are, of course, *Valladao vs. Firemen's Fund Indemnity Company*, a decision by the California Supreme Court dated April 21, 1939, reported in 13 Cal. (2d) at 322.

Very briefly—I know court and counsel are familiar with the facts in that case—it appeared that the insured originally reported to the insurance company and on several subsequent occasions reiterated his assertion, that he himself was not driving the automobile which was involved in the collision. Shortly prior to the date of trial, the insured, accompanied by counsel retained by him individually, called upon and advised counsel representing the insurance company that the statements previously made as to the asserted fact that he was not driving the automobile were false. It was further developed and appears from the opinion of the Supreme Court of California that the person who was in fact driving the automobile was the person insured under the terms of the policy. The jury returned a verdict in favor of the plaintiffs and against the insurance company.

The Court: I wish you would make your motion and give me your authorities. I am allowing you to make a record, but it isn't necessary to go into the cases.

Mr. Wynn: I shall cite them, shall I? [218]

The Court: Yes.

Mr. Wynn: The case of Home Indemnity Insurance Company of New York against Standard Accident Insurance Company, reported in 167 Fed. (2d) at page 919. Specifically, I refer to the language in that opinion appearing on 923, and in the Valladao case, page 330, and following.

On the authority of those cases, the defendant asserts that as a result of the undisputed testimony, that conflicting statements were made by assured, prejudice is presumed as a matter of law, that the misstatements are in violation of the assured's agreement to cooperate, and that the assured is precluded from recovery in this case.

The Court: The cases seem to indicate the question of whether or not there was cooperation is a question of fact and not a question of law. The motion is denied.

Mr. Heily: At this time, your Honor, on behalf of the plaintiff Winget, I move for a directed verdict in her favor on the ground that the representations made by the assured were made to others than the insurance company, and the evidence shows in every respect that he cooperated with the insurance company.

The Court: I will overrule your motion on the same grounds as I overruled the defendant's motion. That is a question of fact for the jury and not a question of law.

Call down the jury. [219]

I want to instruct this jury before the recess,

so I would like to limit each of you to 30 minutes to the side for argument. Argument that extends over 30 minutes loses its effectiveness.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: Is it stipulated the jury is present and in the box?

Mr. Wynn: So stipulated.

Mr. Heily: So stipulated.

The Court: You may proceed.

(Argument of counsel for plaintiff and defendant not transcribed.)

The Court: Ladies and gentlemen of the jury, it becomes my duty as judge to instruct you on the law that applies in this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. (The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion and in accordance with the rules of law stated to you.)

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that [220] reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to con-

sider all the instructions and as a whole, and to regard each in the light of all the others.

At times throughout the trial the court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you [221] should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning

a verdict or solely because of the opinion of the other jurors. .

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action.

That attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court would remind [222] you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence you shall believe that the probability of truth favors his testimony in other particulars.

In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence by the manner in which the witness testifies, by the character of his testimony, or by evidence that pertains to his motives.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction [223] in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption. [224]

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that

was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you.

You are instructed that the assistance and cooperation provisions of the policy that Billy Ray Towry had with Standard Accident Insurance Company read as follows:

“Assistance and Cooperation of the Insured—Coverage A * * * The insured shall cooperate with [225] the company and, upon the company’s request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining and attendance of witnesses and in the conduct of suits. The insured shall not, except as his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.”

Under the terms and provisions of the contract of insurance upon which this action is brought, it became and was the duty of the assured Billy Ray Towry to give a fair, frank, honest, and truthful disclosure of any information in his possession demanded by or on behalf of the defendant concerning facts and circumstances surrounding the accident in which he was involved.

You are instructed that the Standard Accident Insurance Company is contending that there was a breach of the cooperation clause of its policy with Billy Ray Towry by him. This is an affirmative defense and the burden of proof is on the Standard Accident Insurance Company to establish this defense by a preponderance of all the evidence in the case and if it fails to do so, your verdict on the issue of cooperation should be in favor of the plaintiff and against Standard Accident [226] Insurance Company.

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of that allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein.

It is your duty to determine whether the said Billy Ray Towry made misrepresentations of facts to this defendant concerning the accident or the surrounding circumstances which were not mere matters of opinion or which were not of such a nature as to be excusable upon the ground of forgetfulness or mistake.

In order for a falsification to constitute non-cooperation, you are instructed that the falsification

must be wilful, deliberate and concerning a material fact.

As to what constitutes lack of cooperation in this case, you are instructed that to prove there is a lack of cooperation, defendant Standard Accident Company must show that there is a failure to cooperate by Towry in some substantial and material respect, and you are further instructed that that [227] misstatement of fact made to the insurance company, if you find it was so made, must be material.

Concerning what is required from an assured to satisfy his obligation to cooperate with the insurer, you are instructed that truthfulness is the keystone. The insured must tell his insurer the complete truth concerning the accident and he must stick to this truthful version throughout the proceedings. He must not embarrass or cripple his insurer in its defense of a civil suit against him by switching from one version to another. Nothing is more dangerous to an insurer than an insured who deliberately falsifies the facts.

You are instructed that the law of the State of California permits the taking of what is known as the deposition of the parties to a law suit. In the action filed in the State Court by Vivian Delozier, now known as Vivian Winget, vs. Billy Ray Towry, Vivian Delozier had the deposition of the defendant, Billy Ray Towry, taken under the provisions of Section 2055 of the Code of Civil Procedure.

You are instructed that depositions under Section 2006 of the Code of Civil Procedure of the State of California may be taken as follows:

“Depositions must be taken in the form of question and answer. The words of the witness must be written down, in the presence of the witness, [228] by the officer taking the deposition, or by some disinterested person appointed by him. It may be taken down in shorthand, in which case it must be transcribed into long-hand by the person who took it down. Such officer and the person taking down such testimony must be disinterested persons unless otherwise stipulated by the parties. When completed, it must be carefully read to or by the witness and corrected by him in any particular, if desired, by writing or causing his corrections to be written in the body or margin of or at the bottom of the deposition, and must then be subscribed by the witness. The officer before whom the deposition is taken must write his initials near said correction. If the parties agree in writing to any other mode, the mode so agreed upon must be followed.”

You are instructed that the defendant, Standard Accident Insurance Company, contends that its assured, Billy Ray Towry, failed, refused and neglected to cooperate with it in securing and giving evidence and concealed evidence from Standard Accident Insurance Company and also made false and untrue statements in a sworn deposition intended for use upon the trial of an action filed in the Superior Court of Ventura County, [229] California.

If you believe that after the giving of his deposition and before correcting the same, Billy Ray Towry informed the Standard Accident Insurance Company of the fact that he had been drinking some beer on the day of the accident, to wit: January 26, 1949, then you may take that into consideration in determining whether or not Billy Ray Towry acted in good faith in his dealings with Standard Accident Insurance Company and whether or not he violated the cooperation clause of his policy.

If you find that the said Billy Ray Towry did fail to cooperate with the defendant as such *term* has been defined to you, in these instructions, you may not speculate as to what might have been the final outcome of the actions against him in the event he had not been guilty of such failure.

You are instructed that if you believe, under the evidence of this case, that the defendant, Billy Ray Towry, did not violate the terms and provisions of his policy with Standard Accident Insurance Company respecting the cooperation clause already read to you, then I instruct you that your verdict should be in favor of the plaintiff and against the defendant, Standard Accident Insurance Company, upon the issues of cooperation or lack of cooperation.

I have had the clerk prepare two forms of verdict, which read as follows after the name of the case: [230]

“We the jury in the above-entitled cause find in favor of the plaintiff Vivian Winget and against the defendant Standard Accident Insurance Company of Detroit, Michigan.”

Then there is a place for signature and a place for the date.

The other verdict reads, after eliminating the heading:

“We the jury in the above-entitled cause find in favor of the defendant Standard Accident Insurance Company of Detroit, Michigan, and against the plaintiff Vivian Winget.”

And there is a place for signature of the foreman and the date.

You are to take these two forms of verdict with you to the jury room, and upon your retiring to the jury room, you are to designate one of your number as the foreman. The foreman will be your spokesman to this court.

After you have deliberated upon this matter and have come to a conclusion as to whether the verdict should be for the plaintiff or for the defendant, you shall have your foreman sign the proper verdict and notify the bailiff so that you can be returned to this court to give your verdict.

Do respective counsel have any objections to the instructions as read? [231]

Mr. Heily: None that haven't already been voiced.

Mr. Wynn: I haven't any other, your Honor.

The Court: Swear the bailiffs.

(The jury then retired to consider on its verdict at 2:45 p.m., and returned to the court room at 4:15 p.m.)

The Court: Is it stipulated the jury is present and in the box?

Mr. Heily: So stipulated.

Mr. Wynn: So stipulated.

The Court: Ladies and gentlemen of the jury, have you reached a verdict?

The Foreman: We have, your Honor.

The Court: Will you give the verdict to the bailiff? The clerk will read the verdict.

The Clerk: "In the United States District Court, Southern District of California, Central Division.

"Vivian Winget, plaintiff, vs. Standard Accident Insurance Company of Detroit, Michigan, a corporation, Thomas B. Mack, etc., defendants, No. 12,327-HW.

"We the jury in the above-entitled cause find in favor of the plaintiff Vivian Winget and against the defendant Standard Accident Insurance Company of Detroit, Michigan. [232]

"ROBERT J. BERNARD,

"Foreman of the Jury.

"Dated: March 29, 1951, Los Angeles, California."

Ladies and gentlemen of the jury, is the verdict as presented and read the verdict of each of you? So say you all?

The Jurors: Yes.

The Court: Do you wish the jury polled?

Mr. Wynn: Waive the polling of the jury.

The Court: Ladies and gentlemen of the jury,

you are about to be discharged. I want to add my thanks to the thanks of the attorneys.

Mr. Heily: Thank you very much, ladies and gentlemen.

The Court: This has been a very interesting case, at least it has been to me, and it is always nice when we have a jury that will pay attention and that seems to assimilate some of the issues that are involved in a lawsuit. Some of the juries don't go that far, but I want to say to you this jury has been a very pleasant jury. You will now be discharged until you receive further notice from the clerk.

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: There is still pending before the court a question of interest. As far as I know, the defendant hasn't [233] had an opportunity or hasn't presented any authorities. I think the matter should be set down for a day certain.

Mr. Wynn: That was going to be my suggestion, your Honor, and also in connection with a motion which I will wish to present for entry of judgment notwithstanding the verdict of the jury, which I believe under the law of California applied here must be made before entry of judgment upon the verdict of the jury. It is my understanding that delay may be made of entry of the verdict for the purpose of interposing that motion and a ruling thereon.

I would suggest that, counsel being willing, a

time be fixed convenient to the court for the presentation of that motion and the ruling with reference to the allowance of interest.

Mr. Heily: In that connection, your Honor, I would like very much if we could dispose of both matters today. So far as the time element is concerned, I think it would take just a few minutes as far as my presentation is concerned. I would like to get back to my office.

The Court: I don't feel I am qualified to pass on the motion for interest today. If I pass on it, I would probably hold against you, so if you are sincerely interested in this matter and believe you are right, you'd better make arrangements to come down another day.

Mr. Heily: Well, could we argue the motion today and [234] then have you take it under submission?

The Court: You will have to come back here if counsel makes a motion for judgment notwithstanding the verdict. As far as I know, he can make the motion now and I can set the matter down for argument at some other time, rather than have it today.

Mr. Heily: Do you feel you are not prepared today, Mr. Wynn?

Mr. Wynn: I think it would be imposing on the time of counsel and the court if I attempted now to argue the motion at length, because I would expect to——

The Court: I think counsel has a right to prepare.

Mr. Heily: I was under the impression Mr. Wynn was prepared. If he is not prepared, I will not ask for it.

The Court: I think he has a right to review the evidence, to reconstruct his research, in the light of the facts that have developed in the case.

Mr. Heily: I just wanted to get across, both to the court and counsel, my thoughts on it. If there are any requests for a continuance, I will be glad to go along with Mr. Wynn.

Mr. Wynn: Yes. I will request that a time convenient to the court be set down for the presentation of the motion by the defendant for judgment notwithstanding the verdict and the presentation by counsel for the plaintiff. [235]

The Court: I think I can probably hear this a week from tomorrow. That is on April 6th.

Mr. Wynn: That would be satisfactory to me.

Mr. Heily: At 10:00?

The Court: At 10:00 o'clock. May I suggest for the purpose of the record you make your motion now for a judgment notwithstanding the verdict, and then I will continue the matter until April 6 at 10:00 o'clock for further proceedings.

Mr. Wynn: At this time, in open court and after the return of the verdict of the jury in favor of the plaintiff and before entry of a judgment upon such verdict by the court, defendant Standard Accident Insurance Company moves the court for its order directing entry of judgment in favor of said defendant and against the plaintiff Vivian Winget.

The Court: The matter will be continued until April 6 at 10:00 o'clock for argument, and on April 6 at 10:00 o'clock we will also have the argument as to the question of interest.

There are two questions involved in interest. The first question is whether interest should be allowed upon the \$10,000, and the more important question, I think, is whether interest should be allowed upon the entire judgment.

We will stand now in recess until 10:00 o'clock tomorrow morning. [236]

(Whereupon, further proceedings in the above-entitled action were continued to April 6, 1951.) [237]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 26th day of July, 1951.

/s/ S. J. TRAINOR,

Official Reporter.

[Endorsed]: Filed July 27, 1951. [238]

April 6, 1951, 2:00 P.M.

The Clerk: Vivian Winget vs. Standard Accident Insurance Company, No. 12327, for further proceedings.

Mr. Heily: Ready for the plaintiff.

Mr. Wynn: Ready for the defendant.

The Court: What is the disposition as to the defendant Mack?

Mr. Wynn: I am to receive in the mail this morning the papers from Mr. Hollingsworth in Venture, if the court please. The morning mail had not arrived, but I talked to Mr. Hollingsworth yesterday. That is to dispose of his participation in both actions, I mean his action.

The Court: I understood the stipulation of his judgment could be entered.

Mr. Wynn: That is correct, and he is forwarding to me a satisfaction of judgment. Then as to his participation in the Winget case, Mr. Hollingsworth was of the opinion that the proceedings at the trial disposed of him. He was asking for no affirmative relief in the Winget action, and he would simply be dismissed therefrom, he thought.

The Court: Inasmuch as Mr. Mack is out of this case, don't you think the proper move would be to make an order dismissing the defendant Mack as a defendant? Maybe I shouldn't dismiss him unless the plaintiff wants to make a [2*] motion to dismiss. Do you want to keep the defendant Mack in here?) You haven't proved any cause of action against Mack.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Heily: Well, your Honor, we feel your ruling on the question of the pro rata distribution of the proceeds of the policy is against us. We would not want to consent to anything to——

The Court: I don't want you to do anything that is going to jeopardize your position.

Mr. Heily: That's the point.

The Court: If this matter goes up to the Circuit Court, I am quite sure that matter will be argued there and if the Circuit would decide you are entitled to a proration, rather than limited to \$10,000, although they have settled with Mack, nevertheless you have got some other money to play with there.

Mr. Wynn: I wrote to Mr. Hollingsworth and Mr. Henderson stating that satisfaction of stipulated judgment was entered and I think there should be documents furnished to cover their dismissal as a defendant in the Winget action. In response to that, he called me and said, "We make no claim therein."

The Court: I will have a court room full of people here later, so I would like for you to present your motion and argument as rapidly as possible.

Mr. Wynn: I will, your Honor. In the first place, as [3] you recall, there was also the matter of disposing of plaintiff's claim that interest in any event should be allowed——

The Court: I will dispose of that when I dispose of your motion.

Mr. Wynn: I have a case I want to call your attention to on that in the Supreme Court of the State of California.

The Court: I am pretty well satisfied in the matter.

Mr. Wynn: May I give the court simply the citation on that case? 8 Cal. (2d) at page 476. The case is Sampson vs. The Century Indemnity Company. I ask the court to compare the language of the policy there with the policy in the case at bar and the decision of the court, which I think completely disposes of it.

At this time, I wish to present my argument upon the motions for judgment notwithstanding the verdict, which I understand under the federal rules is an argument upon the legal questions which were proposed at the time the motions for directed verdict were made. Those legal questions, I think, very simply, although perhaps not comprehensively, can be stated as follows.

First, whether an admittedly false statement concerning, in this case, the drinking of beer by the assured shortly prior to the time of the accident, is as a matter of law, a breach of the cooperative clause.

Secondly, and as an offshoot of that principle in [4] the event there is uncontradicted testimony or documentary proof that such a conflicting statement was originally made, as in this case by deposition, and subsequently recanted, must the insurer, in addition, prove that that statement was prejudicial to its interests in the proceeding in the lower court.

The Court: I intimated at the time of trial I

did not think the cases went so far as to require the insurance company to prove that they relied on it or that the statement was detrimental. I have gone along with you on that case. If you want to argue, I might change my position.

Mr. Wynn: I am saying these were the legal principles, if the court please.

Thirdly, the additional legal principles that despite the question of prejudice, entirely set apart from it, under the policy containing a provision, as does the policy in the case at bar in condition No. 11, a condition that no action shall lie on the policy unless as a condition precedent the insured shall have complied with all terms of the policy, that such a provision in the policy makes is unnecessary in any event to consider prejudice, and it need only be shown that there was a false statement in fact.

I assume that the court has considered and read the cases of Valladao in 13 Cal. (2d) and the Home Insurance Company in 167 Fed. (2d). In view of the court's indication [5] that argument might be limited here as much as possible, I will not go into those cases in detail at this time.

I would like to call your attention to two additional cases which I think have not formerly been cited in any writing submitted to the court.

The Court: Mr. Wynn, before you proceed, may I say this to you. We have a contract. Now, the first question that comes up upon a contract, I think, is whether or not the contract is to be interpreted according to its terms or whether it is to be interpreted otherwise.

The first question that arose in this case about the interpretation of the contract was the question relating to the question of the proration of the judgment. I held to the literal wording of the contract, saying that the limit on one individual would be \$10,000. I interpreted that according to the literal meaning of the contract.

Now we come to subdivision 8, which says that the insured must cooperate with the company. Now, I have either got to follow a literal interpretation or I have got to go back and reverse myself on the other interpretation. In other words, I can't in one place say the contract speaks for itself, we will interpret it from a literal point of view, just what it says, and then later say, "Well, it doesn't mean what it says. It means something else."

In order to be consistent, I have got to either [6] hold that it meant that the limit was \$10,000 to one individual and that it meant that the cooperation was with the company, or I am going to have to hold that the clause about \$10,000 to one individual was not binding and, consequently, the cooperation with the company was not binding, it is cooperation with somebody else. There is my predicament.

Mr. Wynn: If I follow the court, you are suggesting that the cooperation clause here means that it must be concluded, as a matter of fact, that whatever the insured did was not cooperating. Do I make myself clear?

The Court: No. I am saying this. I am having in mind the ruling of the court and I am perfectly willing to accede. That was on the question of

whether or not the statements made to others than the insurance company were a failure of cooperation. If the insurance company, in other words, the representative of the insurance company, had gone to the hospital, had taken a statement from the insured, and had asked the question, "Had you been drinking?" and he said, "No," then I would say that was an evidence of non-cooperation, but that was not the case.

The Motor Vehicle Department went out and made an independent investigation. Somebody told the Motor Vehicle Department, I don't know who told them, that the insured was not drinking. The statement was prepared for him to sign and he signed that statement. [7]

Now, whether or not the information that was given by somebody else that he was not drinking, or the information that he gave to the Motor Vehicle Department, was a lack of cooperation, I don't know.

Mr. Wynn: Then we go in sequence from the accident report, which was offered and rejected, to the next document, which was the statement of July 11, 1949, the typewritten statement admittedly initialed and signed by the insured, which was admitted.

The Court: Which was admitted.

Mr. Wynn: Yes, which was admitted. That, I take it, the court would regard as a representation made to the insurance company of the facts therein contained.

The Court: Yes.

Mr. Wynn: And in such a statement, as I recall, the statement was made by the assured that there had been no drinking, or there had been no drinking of intoxicants, or something to that effect, the word beer not being mentioned in quotes.

The Court: Here is your problem. The question of cooperation is a question of fact. In other words, the document was admitted in evidence. You presented to the jury the fact that the insured had said that and that it was not true. Now, it was up to the jury to decide whether or not that was or was not cooperation. [8]

Mr. Wynn: Now, your Honor, that is where our paths begin to diverge.

The Court: All right.

Mr. Wynn: Because I submit that under the holding of the Supreme Court in the Valladao case, the Circuit Court for the Ninth Circuit in the Home case, and the decisions of the District Court of Appeals, in both of which hearings were denied in the Supreme Court, the Wright against Farmers case, in all of those the Appellate Courts have said that cooperation under the facts is not one of fact for the jury, but is a matter of law for the decision by the court, and they say, further, that where the evidence shows—in most of these cases documentary evidence shows that the insured made one statement, subsequently changed his version entirely, and made another statement, and there is no issue as to that fact, neither the jury nor the court can speculate as to what the results might have been otherwise

whether in fact the insurer was prejudiced in the trial of the case. These cases hold, and I submit they hold, that in such cases the violation of that clause is prejudice as a matter of law and cannot be said to be anything but failure of cooperation. Let me direct the court's attention in that particular——

The Court: Let me ask you another question before you direct my attention to something else. Under the present policy, in the state of California a person is required, or at [9] least assumed to have had an insurance policy or at least adequate protection before he drives an automobile. It used to be the theory that the driver of an automobile would take out a policy to protect himself. But don't you think that the trend today goes further than that? That is goes, not to the protection only of the insured, but the protection of the public? .

Mr. Wynn: I do.

The Court: And under the present law, I don't know whether this was the law when the insurance policy in question was issued, but under the present law, I think the pedestrian on the street or the person driving in another automobile has just as much right to rely upon an insurance policy to protect them as the insured has to rely upon the policy to protect himself.

Mr. Wynn: Yes. That is an argument that was advanced in one of the dissenting opinions in one of these cases. I have forgotten which one it was. I can't give the name of the judge who advanced that argument, that there was a third party beneficiary contract when the policy was issued,

and the potential injured person was the third party beneficiary, and once an accident occurred, he had a vested interest which could not be defeated. In effect, that was the reasoning.

The Court: I wouldn't go that far, that he had a vested [10] interest, but I do go this far, that the interest that he has, the protection he has, should not be taken away from him on a technicality. There should be very substantial evidence if you are going to take that protection away from the injured party.

Mr. Wynn: My opinion is that at the time this policy was written, which was in February of 1948, the law of California did not require of every driver of a motor vehicle a public liability insurance policy. That is No. 1.

The Court: It doesn't require it yet, does it?

Mr. Wynn: And, No. 2, that it does not require it yet. Those are my two answers.

The Court: The law, as I understand it, is in the event of an accident, if you do not have protection and do not take care of the judgment, then you lose your right to drive.

Mr. Wynn: That's right, but you don't have to have a policy then. You can put up security with the Division.

The Court: I assume that although you are supposed to have a driver's license to drive a car, there are a lot of people driving automobiles without a license or with a revoked driver's license. Excuse me for interrupting.

Mr. Wynn: That's all right. I want, then, to drive on to this point. In each of these cases, the four I am particularly relying on, the four cases in sequence, 13 Cal., [11] 33, 39, and the Circuit Court opinion, in each one of these cases it was suggested by the plaintiff, the injured party, that if all that happens in this case was that, and as a matter of fact, what harm did the misstatement do to the insurance company, we asked the jury to find, and the jury did find that it was not injured in any respect.

Take the Valladao case. The insured said, "I was not driving the car. Somebody else was driving it with my permission." It didn't make any difference as to the coverage of the policy whether the insured was driving the car or not. It was an omnibus clause that covered the man who ultimately conceded that in fact he was driving the car. So the plaintiff said, "What difference does it make that he made a false statement as to who was driving?" Not the slightest, as far as the liability of the insured was concerned, because somebody is liable anyhow.

So in this case, what difference does it make if this man lied when he was asked the specific question, "Did you drink any beer?" and he said "No." The jury said, "We all drink beer and we all go out and drive our cars, and what difference does it make if he lied about that?"

But as the court stated in the Valladao case, and has repeated in the following cases, we can't speculate about that. The fact is that the law is if there

is a misrepresentation of a fact connected with the accident, if there is a [12] misrepresentation of such a fact, and there can be no question but that there was such a misrepresentation, the law is that that presumes prejudice to the insurance company and is a complete defense under the policy.

That is my position and I urge that it is completely supported by these cases.

In the Margelleti case, arising in San Diego, the facts were an accident occurred. The woman driver was seen by a representative of the insurance company, chatted with her, but took no statement from her. No report was made by her of the accident at all. She didn't report it. There isn't any claim she made a false statement. She didn't report about the accident. The plaintiff in that case, the injured person in that case, said, "Well, here we gave them every opportunity to go into all the facts and, as a matter of fact, they had everything available to them. It was a case of liability anyhow."

"No," said the District Court of Appeals, backed by the Supreme Court of California, "that wasn't it. In fact, she failed to cooperate in fact. There is no question that she didn't make any statement to the insurance company."

On the Wright case against Farmers, arising up in the San Joaquin Valley, Wright was a passenger, and Sellers the driver of an automobile. Sellers went to his insurance company, reported the accident, and after preliminaries which [13] aren't necessary, I mean the ultimate thing was that in

that case he finally verified an answer in which he denied allegations in the complaint which sought to impose the wilful misconduct law. He signed the answer, verified the answer, in which those were denied. At the trial, he got on the stand and testified to the contrary, testified that he was in fact driving the car at 70 miles an hour and that in fact his passengers complained, had said to slow down, and he hadn't.

Whereupon, the insurance company said, "All right, we are through," It was argued in that case, as it has been and will be argued here, what difference did it make? If he had told the insurance company the truth to start with it certainly was a case of liability, and what difference did it make, what prejudice was there to the insurance company that he didn't?

But the court says, "No, prejudice is presumed as a matter of law."

The Wright case, as I recall it, was an appeal from an order denying the defendant insurance company's motion for a directed verdict. The Margelleti case was an appeal after the jury verdict had been returned for the injured. The Valladao case, the original case, was an appeal by the injured person from a judgment of the trial court under a judgment notwithstanding the verdict of the jury, and the Home case was an appeal from Judge O'Connor's findings of [14] fact after a trial where the insured had made about three conflicting statements of his version of the accident, and Judge O'Connor tried the case and said, "Well, it is

obvious that it made no difference. His story, which he finally gave on the stand, was that he had fallen asleep at the time of the accident, and if he had given that story to the insurance company in the very beginning of the case, it wouldn't have made any difference in the final outcome."

So Judge O'Connor said, "There was a misrepresentation, but I find that the insurance company was not prejudiced. I find that it didn't make any difference in fact."

The Circuit Court for the Ninth Circuit said, in almost this language, that is what we are not permitted to do, to speculate.

Now, it is pointed out in all these cases, after that argument, that it is a matter of law, prejudice, and it must be. The court says, "We can't speculate as to what the insurance company might have done if it had known at the beginning. They might have settled the case on advantageous terms. But we can't now use our back sight and say, "Well, it is obvious that if the insurance company from the day of this accident knew that the man had been drinking beer, the final outcome of the litigation wouldn't have been changed one whit." [15]

I am only arguing the law. I can see no way to get around these cases. It is as a matter of law prejudicial once there is an undisputed misrepresentation of a factual statement which is related to the accident itself. Just as in the Valladao case, the insured made a misrepresentation of a factual matter relating to the accident: Was he driving or was he not driving? And what difference did it

make? The insured might have said to himself, "Well, there is coverage anyhow, but for reasons of my own, I choose to make that false statement," as against the case at bar where he was sworn to tell the truth and answered directly a question, "Did you drink any beer?" "No." That is a positive sworn statement under oath.

You can't avoid that. The assured on this stand in this court room said it was false when he said it, that the answer was false. Later on, he recants that story.

I say that neither the jury nor this honorable court can say, "Well, it didn't make any difference, I am satisfied it didn't make any difference, and whatever had been the story, the verdict of the jury in the lower court would have been the same. The insurance company couldn't have handled it any differently; therefore, it was not prejudiced."

I say we can't do that, and I rest upon the decisions of the Supreme Court of California and its denial of rehearing in 39 and 33 and in the judgment of the Circuit [16] Court in the Ninth Circuit.

The Court: Let's hear what Mr. Heily has to say about it.

Mr. Heily: If the court please, on the argument for directed verdict, I think the court hit the nail on the head in the beginning. Was the insured co-operating with the company or was he responding to questions by some other persons? Now, that is just one element. We contend he was not responding to questions by the insurance company, but to questions from somebody else, and he had the right

upon making these statements in the deposition to later correct that statement, and that was known to the insurance company.

The Court: How about the statement that was made and signed by him? There is an argument here. I think there is a very legitimate argument whether the statement that he signed at the hospital was a statement that was made to a stranger. The statement that he made in his deposition was a statement that he did not make to the insurance company representatives, but he made to the plaintiff's representatives. But we do have this one case, this one incident, when he actually made the statement to the investigator of the insurance company.

Mr. Heily: That is one where he said, "I did not drink any intoxicating liquor."

The Court: There is a definite statement made to the [17] insurance company.

Mr. Heily: All right, your Honor. I will argue that very point. Counsel for the defendant relies on this Valladao case, which is the first and the leading of the four cases that he has cited. I will quote to you a portion of the language in the Valladao case. It is generally established, and we shall not pause to refer to the authorities, that what constitutes cooperation or lack of it on the part of the insured within the meaning and effect of the cooperation clause is ordinarily a question of fact. This is so because a dispute not only exists as to the actual statements and conduct of the assured in the premises or because of the existence of an uncertainty as to the intent or motive underlying his

statements or conduct, so, your Honor, it is pointed out in that case it is a question of fact as to whether there was cooperation.

In other words, to determine whether there was cooperation, we must investigate the motives and the intent underlying the reasons why he made such statements, and that is exactly what we did. The major portion of his argument dealt with this matter of prejudice.

I tried this case from the plaintiff's standpoint strictly on the question of was there cooperation or wasn't there cooperation. I requested no instructions regarding this matter of prejudice. In my opening brief on the [18] case, I submitted no authorities regarding the matter of prejudice. The only thing we were concerned with here was whether there was cooperation or whether there wasn't.

Now, the jury has determined that there was cooperation, because they checked the motives and the statements underlying acts of the assured and determined in their opinion that he had cooperated, and especially that he had cooperated regarding a material matter. Perhaps he didn't cooperate regarding an immaterial matter. We are not admitting that but perhaps he didn't. But it is regarding material matters that we are concerned with, and he did cooperate.

So, your Honor, with the language of his leading case, there is no other decision the court can make but to deny the motion for directed verdict. It would be error for the court to allow it.

In the Valladao case, the court made another observation, that there should be substantial evidence of non-cooperation. That is correct. In the Valladao case, the insured denied time after time that he was even driving the car. In the Home Indemnity case, there were four or five statements, each and every one of them insisting upon a false matter of fact. He continued, the assured continued in the Home Indemnity case throughout the trial to assert the false statement of facts. [19]

Obviously in both cases there was very substantial non-cooperation, so substantial that the court was able to say without question that there was no cooperation.

But in this case, and in all the cases where there is some question as to whether he has cooperated or not, it is a question of fact for the jury.

Now, turning to the matter of interest, I believe I neglected to quote to you one of the clauses in this policy at the time I last discussed this question that is definitely important. In clause 2 of the insurance agreement, subsection B of that clause, it says the insurance company shall pay all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon.

Now, the closing sentence of that paragraph, II, reads as follows:

“The company agrees to pay the amounts incurred under this insuring agreement, except

settlements of claims and suits, in addition to the applicable limit of liability of this policy.”

Now, let us examine the case cited by counsel for the defendant, the Sampson case, 8 California (2d) 476. In that case we had language in the policy, very similar, almost exactly like this one, with this exception. There was no [20] language in that policy, in the 8 Cal. (2d) case, reading “The company agrees to pay the amounts incurred under this insuring agreement in addition to the applicable limits of the policy.”

There is no such language. Therefore, the court said in that case that it hardly seems probable that the parties to the policy intended to make it liable for interest on any greater amount and, “Surely we would not be justified in so construing the policy unless it contains language clearly expressing such an intention.”

Now, in our case before this court, we do have that language. It says, “All interest” on the judgment in addition to the applicable limit of liability of this policy.

That brings us down to a discussion of the New Jersey Fidelity case, 33 Fed. (2d). In that case the policy stated, “Irrespective of the limits of the policy, on liability hereinafter mentioned, the company will pay all costs and interest.”

The Court: What is the subdivision here?

Mr. Heily: II, your Honor, of the insuring agreement.

Mr. Wynn: It is on the second page of the policy.

Mr. Heily: As the court indicates in this California case, you must read the whole of the policy. Taking the pertinent words of that paragraph applicable to this question, [21] we read, "The company agrees to pay all interest accruing after entry of judgment in addition to the applicable limit of liability of the policy."

Let's read it again. "The company agrees to pay the amounts incurred under this insuring agreement." The amounts incurred by whom? Incurred by the assured, of course. The assured has incurred a liability of interest at 7 per cent on \$32,000. The company agrees to pay the liability incurred in addition to the applicable limits of the liability.

The Court: May I ask Mr. Wynn, what do you think the policy means when it says all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon? What do you mean by "limit of the company's liability"?

Mr. Wynn: The limit is \$10,000 as stated on page 1 of the policy. That we have discussed several times.

The Court: Until the company has paid, tendered, or deposited in court such part of such judgment.

Mr. Wynn: Until that time when it is deposited or paid to the injured person, up until that time it must pay interest on what? Here is the language of the policy.

The Court: It says interest on what? On the judgment. That is what the policy says. [22]

Mr. Wynn: That is exactly what they claim here. May I point out from this case, or does your Honor want to consider it?

The Court: Let me see the case. I would rather read it myself.

(Short interruption.)

The Court: Well, I think the words of the court are rather illuminating. The court calls attention to the well established rule that if there is any ambiguity, the contract must be read more strictly against the insurance company than against the parties who received it. The court points out, also, that the court does not have the entire contract, it has only a part of the contract. But the court says:

“It hardly seems probable, therefore, that the parties to the policy of insurance, after expressly limiting the liability of the company to the principal sum of \$10,000, intended to make them liable for interest on any greater amount.”

I think that is good law. It hardly seems reasonable, after the insurance company would limit its liability to \$10,000, that it would then go one step further and increase its liability, although I am satisfied it does increase its liability above the \$10,000, because I don't think there is any question there is a liability for costs. [23]

“Surely we would not be justified in so con-

struing the policy, unless it contains language clearly expressing such an intention. We find no such language in the policy.”

Now, I think then we have to go back to the policy in question here.

Mr. Heily: There is such language in this policy.

The Court: I don't know. I have indicated before I am trying to interpret the policy literally, what it says. I am not trying to read something here that is not here. It says to pay all interest accruing after entry of judgment. Pay all interest accruing after judgment. It doesn't say pay interest on \$10,000. All interest after entry of judgment. Now, there is a time to stop, that is, until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon. Well, the company never did pay or never did deposit in court the money. I don't think the policy itself is ambiguous. I think the policy is very definite as to what it means.

I am tending to interpret this policy literally. I think the policy itself says the company is to pay all interest upon the judgment unless the company either pays off the limit of its liability or deposits the money in court. I don't know how you can read this any other way. [24]

Mr. Wynn: May I suggest the language, your Honor, is precisely and exactly the same as in the Sampson case. It is almost word for word the language which your Honor is now considering. I read from the policy.

“All interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company’s liability thereon.”

So far it is precisely the same. Counsel has pointed out that in this policy it further provides, “The company agrees to pay the amount incurred under this agreement in addition to the principal amount of the policy.” In addition to the \$10,000, as in the Sampson case, it is agreeing to pay interest. The whole question is interest on what?

In the Sampson case, reading the interest clause that your Honor has read, and I have read, the Supreme Court said it obviously means interest on the company’s liability and it would be absurd to think that the company proposes to pay interest on \$190,000.

Mr. Heily: Your Honor, how are we going to reconcile the closing clause of that paragraph with the clause that they shall pay all interest unless—We state it clearly shows from the policy that that means all interest on the [25] judgment.

The Court: I would be inclined to go along with you in literally reading that policy, but we have here an interpretation of the Supreme Court. How are we going to get around it? “All interest accruing after the entry of judgment,” and in that case there was a judgment for more than \$10,000. “Until the company has paid, tendered, or deposited in court such part of such judgment as does not exceed the limits of the company’s liability.”

I may not agree with the Supreme Court, but I have got to follow it.

Mr. Heily: That case ends there, you see. They don't have the clause in that case that we do in this policy.

The Court: You have this clause about paying interest pretty nearly word for word.

Mr. Heily: I agree, and the court, I believe, is right in deciding as they did on that case with the clause that they had, but our policy does not stop there. Our policy goes on to say the company agrees to pay the amounts incurred. By whom? The insured, of course. That means interest on \$32,000. The company agrees to pay the amounts incurred under this agreement in addition to the applicable limits of the liability of this policy. You see, this policy goes further.

The Court: Where is that clause? [26]

Mr. Heily: That is at the close of paragraph II of that insuring agreement. It is all inclusive. It is not a subdivision paragraph. It is part of the same paragraph of that insuring agreement. The most we can say for the defendant, your Honor, is that creates an ambiguity which must be interpreted against them.

The Court: Well, I am going to have to hold against you, Mr. Heily. I think the Supreme Court case is binding.

Mr. Heily: I would like to quote to you from this federal case. It states, "An examination of different policies brought to this court discloses that they usually contain a provision limiting the right

to recover interest on that portion of the judgment which the company has obligated itself to pay. But the policy in suit contains no such limitation, and we do not feel at liberty to insert such limit into the policy so as to make a new contract for the parties."

That is what we would be doing here if we limited interest to just \$10,000.

The Court: I am going to rule in this case the interest is limited to \$10,000, that you are entitled to recover the \$10,000 plus interest, plus the court costs.

Also, I am going to deny the motion for a directed verdict, although I feel that there is some merit to the argument of Mr. Wynn. Nevertheless, I feel that this is [27] a question of fact. The fact was presented to the jury. The jury found that there was no lack of cooperation, and under the circumstances of this case I would not be justified in setting aside the verdict of the jury.

Such will be the order.

Mr. Wynn: If the court please, may I ask for a reasonable stay of execution, 20 or 30 days?

The Court: Well, perhaps Mr. Heily will want to appeal, also. If I get both sides to appeal a case, I think I have done pretty well. How much stay do you want?

Mr. Wynn: I would like 30 days. I probably will not require that much.

The Court: You ought to be able to do it in less than 30 days.

Mr. Wynn: 20 days, then, your Honor.

The Court: I will grant a stay for 20 days. What shall we do about the other defendant? Mr. Heily doesn't want to dismiss the other defendant.

Mr. Wynn: I don't know what I can do.

The Court: You can't dismiss the other defendant, so I guess we will have to let the other defendant stay. If he wants to get out of this case, he will have to come down and make a motion. If he makes a motion, I will be able to make a ruling on it. [28]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 31st day of July, 1951.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed July 31, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 78, inclusive, contain the original Petition for Removal of Cause to United States District Court and exhibits thereto; Answer of Defendant, Standard Accident Insurance Company of Detroit, Michigan; Answer of Defendant Thomas B. Mack; Plaintiff's Memorandum Prior to Trial; Defendant's Memorandum Pursuant to Local Rule 12; Verdict; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Notice of Appeal from Part of Judgment; Affidavit of Service of Notice of Appeal; Statement of Points; Designation of Record; Designation of Record to be Prepared on Behalf of Standard Accident Insurance Company of Detroit, Michigan; Statement of Points Relied on by Standard Accident Insurance Company of Detroit, Michigan; and Motion and Order for Extension of Time to File Record and Docket Appeal which, together with original Mach's Exhibit #1, Winger Exhibits 1 to 5, inclusive, and Defendant's exhibits A to F, inclusive, and original reporter's transcript of proceedings on March 27, 28, and 29, 1951 and April 6, 1951, transmitted herewith, constitute the record on the appeals to the United States Court of Appeals.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 one-

half of which has been paid by each of the appellants and cross-appellants.

Witness my hand and the seal of said District Court this 6th day of August, A. D. 1951.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13047. United States Court of Appeals for the Ninth Circuit. Standard Accident Insurance Company of Detroit, Michigan, Appellant, vs. Vivian Winget and Thomas B. Mack, Appellees. Vivian Winget, Appellant, vs. Standard Accident Insurance Company of Detroit, Michigan and Thomas B. Mack, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed August 7, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12327-HW (U. S. Dist. Ct.)

VIVIAN WINGET,

Plaintiff, Appellee and Appellant,

vs.

STANDARD ACCIDENT INSURANCE COM-
PANY OF DETROIT, MICHIGAN, a Cor-
poration,

Defendant, Appellant and Appellee.

THOMAS B. MACK, JOHN DOE I and JOHN
DOE COMPANY,

Defendants.

STATEMENT OF POINTS RELIED UPON BY
APPELLANT VIVIAN WINGET

To the Clerk of the Above-Entitled Court:

Comes Now the Plaintiff (Appellee and Appel-
lant) Vivian Winget and states the points upon
which she intends to rely upon the appeal herein:

1. The trial court correctly found that there was no wilful misrepresentation of facts relating to the accident which constituted a breach of the obligation of the assured to cooperate under the terms of the policy involved in this action.

2. The trial court erred in failing to award to Plaintiff and Appellant a pro-rata share of the Twenty Thousand and no/100 (\$20,000) Dollars due and payable under the policy involved in said action. In particular, the court should have awarded Plain-

tiff and Appellant the sum of Three Thousand Six Hundred Seventeen and 02/100 (\$3,617.02) Dollars in addition to the Ten Thousand Ninety-seven and 80/100 (\$10,097.80) Dollars which the court did award to said Plaintiff.

3. Said court erred in failing to award Plaintiff and Appellant interest at 7% per annum from the 30th day of March, 1950, on the total sum of Thirty-two Thousand Ninety-seven and 80/100 (\$32,097.80) Dollars. In particular, said court should have awarded in addition to 7% interest from said date on Ten Thousand Ninety-seven and 80/100 (\$10,097.80) Dollars, interest at 7% per annum from March 30, 1950, on the sum of Twenty-two Thousand and no/100 (\$22,000) Dollars.

4. If it be determined that such error prejudiced Plaintiff and Appellant, then the trial court erred in failing to restrain Defendant Standard Accident Insurance Company from settling with or in any maner paying to or compromising with Defendant Thomas B. Mack and in accepting and approving a judgment by stipulation for Six Thousand and no/100 (\$6,000) Dollars in favor of Defendant Thomas B. Mack and against Defendant Standard Accident Insurance Company.

Dated this 7th day of August, 1951.

/s/ NEIL D. HEILY,

Attorney for Vivian Winget.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 9, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED ON BY
APPELLANT STANDARD ACCIDENT IN-
SURANCE COMPANY OF DETROIT,
MICHIGAN

To the Clerk of the Above-Entitled Court:

Comes Now the defendant (appellant and appellee) Standard Accident Insurance Company of Detroit, Michigan, and states the points upon which it intends to rely upon the appeal herein.

1. There was a wilful misrepresentation of facts relating to the accident which constitute a breach of the obligation of the assured to cooperate as a matter of law, which breach is a complete defense to an action on the policy by the injured person.

2. The claim of plaintiff herein is limited by the contract of insurance to the total sum of Ten Thousand Dollars (\$10,000.00).

3. The plaintiff herein is in any event limited to recovery of interest on the sum of Ten Thousand Dollars (\$10,000.00), as against this defendant.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,
Attorneys for Standard Accident Insurance Com-
pany of Detroit, Michigan.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 9, 1951.

No. 13047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,
MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,
MICHIGAN, and THOMAS B. MACK,

Appellees.

OPENING BRIEF OF APPELLANT VIVIAN
WINGET.

FILED

NOV 12 1951

NEIL D. HEILY, PAUL P. O'BRIEN
515 South "A" Street,
Oxnard, California,

*Attorney for Appellant and Cross-Appellee
Winget.*



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No. 13047

IN THE

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Appellees.

VIVIAN WINGET,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,
MICHIGAN, and THOMAS B. MACK,

Appellees.

OPENING BRIEF OF APPELLANT VIVIAN WINGET.

Designation of Parties.

For the purposes of clarity, appellant and cross-appellee Standard Accident Insurance Company of Detroit, Michigan, will be hereinafter designated as "Standard" or "Defendant Standard." Appellee and cross-appellant Vivian Winget, formerly Vivian Delozier, will be hereinafter

designated as "Winget" or "Plaintiff Winget." Appellee Thomas B. Mack, who is making no appearance on this appeal, will be hereinafter designated as "Mack" or "Defendant Mack." Assured under the policy of insurance involved in the case, Billy Ray Towry, will be hereinafter designated as "Towry."

Statement of Pleadings and Facts.

As will appear from the complaint on file in this case [Tr. pp. 6 to 13], plaintiff Winget on the 31st day of March, 1951, recovered a judgment in the Superior Court of the State of California, in and for the County of Ventura against Towry for the sum of \$32,000.00 with interest thereon at 7% per annum from the 30th day of March, 1950, together with costs of suit in the sum of \$97.80 [Tr. p. 34]. The action in state court was prosecuted upon a complaint which alleged, generally, that the plaintiff was riding as a guest in the vehicle of Towry and that, in the first cause of action, said Towry was guilty of wilful misconduct in the driving of his vehicle, and, in the second cause of action Towry was driving while under the influence of intoxicating liquor and in the third cause of action that Towry was guilty of both wilful misconduct and driving while under the influence of intoxicating liquor. In the course of the trial of the case in state court, the plaintiff Winget moved to dismiss the second and third causes over the protests of insurance counsel for Towry against said dismissal but the Court denied plaintiff's motion to dismiss the same [Winget's Ex. 5 for identification].

As will further appear from the complaint on file in this case [Tr. pp. 6 to 13], in the same automobile accident, defendant Mack was injured as a guest and he filed a complaint for damages in the Superior Court of Ventura County also, and his case and the case of the plaintiff Winget were consolidated for trial. He alleged wilful misconduct of Towry as his only cause of action. [Tr. p. 46.] At the same time that plaintiff Winget recovered judgment for \$32,000.00 as above set forth, defendant Mack recovered a judgment for \$15,000.00 with interest and costs. The two judgments total \$47,000.00 of which Winget's judgment is 68.0851% and Mack's is 31.9149%.

At the time of the aforementioned accident, said Towry had a policy of public liability insurance in force with defendant Standard with limits of liability of \$10,000.00 for each person and \$20,000.00 for each accident. [The policy is Winget's Ex. 4.]

The complaint in this case was originally filed in State Court and that Court, in response to the prayer of the complaint, issued its restraining order and subsequently, an injunction, pending the final determination of the cause, restraining and enjoining Standard from in any manner paying to or settling with defendant Mack for any sum or sums due or owing or alleged to be due or owing under the terms of the liability policy above mentioned. Winget alleges in her complaint that, by reason of the greater size of her judgment over that of Mack's she is entitled to 68.0851% of the total limit of Standard's liability

under the policy in the sum of \$20,000.00, and that defendant Mack is entitled only to the remaining 31.9149% of said sum. Winget further alleges in her complaint that any payment by Standard to Mack under the terms of the policy would result in a satisfaction of \$10,000.00 worth of liability under the policy so that Winget would then be entitled only to the remaining \$10,000.00 under the policy. For these reasons, Winget sought to prevent Standard from settling with Mack pending a final determination of whether Winget was entitled to such pro-rata share of the \$20,000.00.

Defendant Standard, a citizen of Detroit, Michigan, petitioned the District Court for removal of the cause from State Court to the District Court [Tr. pp. 3 to 14], citing the provisions of *Sections 1332 and 1441, Sub-division (c) Title 28 of the United States Code. Section 1441 (c) Title 28 U. S. C.* is to the effect that if a separate and independent claim or cause of action which would be removable if sued upon alone, is joined with one or more otherwise non-removable, the entire case may be removed, or in the District Court's discretion, it may remand all matters not otherwise within its original jurisdiction. Defendant Standard claimed that defendant Mack, a citizen of California, and plaintiff Winget, also a citizen of California, are regarded as being on the same side of the dispute and against the non-resident defendant Standard and therefore the non-resident defendant was entitled to remove the cause from State to Federal Court, citing *Carson v. Hyatt*, 118 U. S. 279. The case

was consequently removed from State Court to Federal Court.

Defendant Standard denied liability under the terms of the policy alleging that Towry failed, neglected and refused to cooperate with Standard in accordance with the provision in the policy to the effect that Towry would cooperate with Standard and assist Standard in securing and giving evidence. The lack of cooperation consisted, as alleged, in Towry giving false statement to defendant Standard concerning the facts of the accident prior to the trial of the actions in State Court [Tr. pp. 14 to 17], in particular, concerning whether he drank intoxicating liquor on the day of the accident.

Defendant Mack answered and asked, as did plaintiff Winget, that the sum of \$20,000.00 due under the policy be paid into Court, but that, instead of pro-rata distribution of said fund, that Mack receive \$10,000.00 thereof. Otherwise, defendant Mack's answer was substantially in line with Winget's complaint. [Tr. pp. 18 to 21.]

Trial of this action commenced in District Court before a jury on March 27, 1951. In the course of the trial, defendant Mack and defendant Standard stipulated for a settlement of Mack's case for the sum of \$6,000.00 and it was moved that the District Court make its order authorizing defendant Standard to conclude such settlement and that the Court rule plaintiff Winget was limited to a recovery under the policy in the principal sum of \$10,000.00. [Tr. pp. 68 and 69.] The District Court, over

the strenuous objections of plaintiff Winget, granted the motion, vacated the restraining order and injunction theretofore made by the State Court [Tr. p. 79] and denied plaintiff Winget's application for a restraining order on Federal Court against such settlement. Defendant Mack was thereupon permitted to withdraw from further participation in the trial.

In the course of the trial the District Court granted the motion of plaintiff Winget to amend her complaint by inserting therein a prayer for interest at 7% per annum from the 30th day of March, 1950 on the total sum of \$32,000.00, the principal sum of the judgment obtained by Winget against Towry. [Tr. p. 32.]

The single issue as to whether Towry had cooperated with his insurance company or not was submitted to the jury [Tr. pp. 29, 31 and 234] and the jury returned a verdict in favor of plaintiff Winget on that issue. [Tr. p. 28.] Upon the issues of pro-rata distribution of the \$20,000.00 fund and interest on the entire \$32,000.00 judgment in favor of Winget, which issues were not submitted to the jury, findings of fact and conclusions of law were made and filed and judgment was made and entered thereon in favor of the plaintiff Winget for \$10,097.80 together with interest thereon at the rate of 7% per annum from the 30th of March, 1950 plus costs. [Tr. pp. 28 to 36.] The findings and conclusions denied Winget's contention for pro-rata and interest on \$32,000.00.

Statement of the Case.

Defendant Standard appealed to this Circuit Court contending that Towry was guilty of making a wilful misrepresentation of facts relating to the accident in the case which constituted a breach of the obligation of Towry to cooperate with the insurance company as a matter of law. This issue was raised by defendant Standard as an affirmative defense in its answer in the case.

Plaintiff Winget likewise appeals to this Circuit Court contending that, although the trial court correctly found there was no wilful misrepresentation of facts by Towry, the trial court nevertheless erred in failing to require Standard to pay into Court the \$20,000.00 and to award to Winget a pro-rata share of that sum due and payable under the policy, and also that the Court erred in failing to award Winget interest at 7% per annum from the 30th day of March, 1950 on the total judgment in State Court in her favor in the sum of \$32,097.80. Plaintiff Winget also contends that if it be determined that such error prejudiced Winget, then the trial court erred in failing to restrain defendant Standard from settling with or in any manner paying to or compromising with defendant Mack and in accepting and approving a judgment by stipulation for \$6,000.00 in favor of Mack and against Standard. [Tr. pp. 268 and 270.]

The issue of pro-rata share was raised by plaintiff Winget in her complaint, the issue as to interest was raised by motion to amend the complaint granted in the course of the trial and the issue regarding approving of

a settlement by stipulation for \$6,000.00 in favor of Mack was raised in the course of the trial at the time defendants Standard and Mack applied to the Court for such approval.

Defendant Mack has not filed an appeal herein but was dismissed from the action on July 9, 1951 (after this appeal was started), without prejudice to Winget's claims regarding pro-ration and interest.

Specification of Errors.

Plaintiff Winget contends that the trial court erred in the following respects:

1. In concluding [Tr. p. 34] that plaintiff Winget is not entitled to a pro-rata share of the total sum of \$20,000.00 payable under the policy.

2. In concluding [Tr. p. 34] that plaintiff Winget is not entitled to interest on the total sum of \$32,097.80, the amount of her judgment against Towry in State Court.

3. If it be determined that such error prejudiced plaintiff Winget, the trial court erred in approving a stipulation for settlement for \$6,000.00 in favor of Mack and against Standard over objection by Winget. [Tr. p. 29.]

ARGUMENT.

This argument will be divided into the two main questions for determination by the Appellate Court on Winget's appeal, first, the trial court should have required the insurance company to pay \$20,000.00 into Court and awarded from such sum \$13,617.02 to the plaintiff Winget (subdivided into "Winget's Theory" and "Authorities supporting Theory") and secondly, the trial court should have required the insurance company to pay interest to Winget at 7% per annum on the full sum of \$32,097.80 from the 30th day of March, 1950.

The Court Should Have Awarded Pro-Rata Winget's Theory.

As indicated above the policy of insurance in this case is what is commonly known as a 10-20 policy. Paragraph I of the insuring agreements, page 2 of the policy reads as follows:

"Coverage A—Bodily Injury Liability—To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile."

Paragraph 1 of the conditions on page 3 of the policy reads as follows:

"Limits of Liability—Coverage A—The limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the com-

pany's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to 'each accident' is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident."

It is to be noted that the last paragraph above quoted contains two clauses divided by a semicolon, the first referring to "each person" and the second referring to "each accident". For the purposes of clarity, I shall refer to these two clauses hereinafter by the "each person clause" and the "each accident clause."

It is plaintiff Winget's contention that when she and Mack, both guests in the vehicle involved, obtained judgments in State Court against Towry totaling \$47,000.00, and those judgments became final, the liability of defendant Standard was then fixed under the terms of its policy at a total of \$20,000.00 plus interest and costs. *From that time on it was of no concern whatsoever to the insurance company as to how the \$20,000.00 was split between the two parties suffering injuries in the one accident, the only concern of the insurance company being whether it was relieved of liability once it had paid the \$20,000.00, plus interest and costs, as it was required to do under its policy.* Plaintiff Winget does not contend that the insurance company is liable to her as an individual

and as a single person suffering injuries in the accident in excess of \$10,000.00 plus interest and costs but she does contend that the insurance company is liable to pay a total of \$20,000.00 plus interest and costs toward the satisfaction of judgments obtained against the assured for bodily injuries arising out of the one accident in accordance with the provisions of paragraph I of the insuring agreements of the policy. *It is extremely important at the outset that the Appellate Court divorce the idea that the insurance company has any say in the distribution of the money from the insurance contract altogether.*

The insurance company has in the trial court and will, undoubtedly, on this appeal, insist that the "each person" clause of paragraph 1 of the conditions fixes its liability to plaintiff *Winget* at the principal sum of \$10,000.00. However, the liability to *Winget* as an individual under the policy is not applying the true facts of paragraph 1 of the conditions to that paragraph. The true facts are that there was an injury to two persons and we would therefore of necessity have to invoke the "each accident" clause of paragraph 1 which definitely fixes the liability of the company at \$20,000.00 for the one accident. The contract therefore has fixed the liability of the company at \$20,000.00 and from there on the insurance company has no interest in how that fund is divided except to see that its liability under the policy is satisfied. Under paragraph 1 of the conditions, the insurance company is not liable to *the person* for \$10,000.00 but is liable to *all persons* for \$20,000.00 for the single accident. The \$20,000.00 is a fund out of which the assured is entitled to have his obligations on judgments partially satisfied. How that fund is to be divided is a matter of equity, as herein-

after set forth, and is of no concern to the insurance company.

Let us assume that plaintiff Winget's judgment in this case were \$12,000.00 and defendant Mack's were \$6,000.00. In such case, the total liability of the company would be to Winget as an individual \$10,000.00 and to Mack as an individual \$6,000.00, making a total liability of the company for the single accident of \$16,000.00. That is the only effect of the phrase in the "each accident clause" reading "subject to the above provision respecting each person." On payment of that \$16,000.00 the company would obviously be relieved from liability under the policy although the distribution of that \$16,000.00 under equitable principles as hereinafter set forth, would be on a pro-rata basis between the two judgment creditors.

To put it another way, the claim that the two plaintiffs in the State actions have two separate funds out of which to receive their claims is inaccurate when we consider the language of the policy that \$20,000.00 shall be paid for one accident. As between each of the claimants individually and the insurance company there is a limit of liability on the part of the insurance company of \$10,000.00. However, as between the two creditors together and the insurance company, the limit of liability on the part of the insurance company is \$20,000.00 and they are entitled to a pro-rata share of that fund. The full \$20,000.00 should be paid into the Court and the Court award the pro-rata share.

Let us assume that three persons were injured in this accident instead of two and each of the three recovered judgments exceeding \$10,000.00 but otherwise the judgments were different in amounts. Obviously, under such

a situation, the Court under the equitable principles hereinafter set forth would be required to divide the \$20,000.00 pro-rata among the judgment claimants. *Is there any reason why the rule should be different as to two than it would be for three?*

Let us assume that instead of Towry having the insurance policy he had \$20,000.00 in the bank and the plaintiff Winget and defendant Mack, both having obtained their judgments at the same time, levied execution, also at the same time, upon that fund. That \$20,000.00 would be then within the jurisdiction of the Court the same as the liability of the insurance company in this case is within the jurisdiction of the Court. Surely it could not be contended that \$20,000.00 in cash belonging to Towry should be distributed in any other way than pro-rata.

Under the terms of paragraph I of the insuring agreements, the insurance company agrees to pay all sums that Towry "shall become obligated to pay by reason of the liability imposed upon him by law for damages." Towry became obligated to pay \$47,000.00. The limit of the policy being \$20,000.00, that amount should be paid in Court for distribution pro-rata by the Court in partial satisfaction of Towry's \$47,000.00 obligation. Towry is entitled to have \$20,000.00 applied by the insurance company on his obligations and Winget and Mack are both subrogated to Towry's rights in this respect.

Another way of looking at it would be that if Towry had paid \$13,000.00 to plaintiff Winget and \$6,400.00 to defendant Mack, he could have forced the insurance company to reimburse him for the \$20,000.00 limit for the one accident. How Towry applied the money on the judgments would be no affair of the insurance company.

It is quite obvious that the only intent of paragraph 1 of the conditions in the policy above quoted, is to determine the maximum limit of the company's liability. *Surely it could not be contended that the insurance company was attempting to contract for and determine the rights of third parties, giving one a preference over the other, when it made its contract of insurance.* Winget, a third party bringing this action, is not suing on the insurance contract but is suing for the liability created and fixed by that contract and definitely in existence in the sum of \$20,000.00.

It seems clear that if the insurance company had settled with Mack for \$8,000.00 and obtained a satisfaction from him, that would release the insurance company from \$10,000.00 worth of liability under its policy. However, plaintiff Winget contending that she has a pro-rata interest in the entire fund of \$20,000.00, sought to diligently restrain and enjoin the insurance company from making any such settlement to her irreparable damage. The moment that she obtained her judgment in State Court she had a property interest in the nature of a lien upon that fund which entitled her to injunctive relief to prevent settlement of claims of others whose claims had likewise been determined. If hers was the only judgment, then of course the fund would amount to only \$10,000.00. But the fund was established at \$20,000.00 when the liability of the company was established at that figure by the \$47,000.00 in judgments. By her diligence she was thus able to bring within the jurisdiction of the Court the liability under the policy so as to avoid a preference in favor of Mack and arrive at a fair and equitable pro-rata distribution of the funds. The fact that the District Court vacated the restraining order of the State

Court and denied Winget's request for a Federal Court injunction [Tr. p. 79] should make no difference. Obviously it was done over the strenuous objections of plaintiff Winget and, on this appeal, must be considered as without prejudice to said plaintiff. Especially is this true when we consider that the insurance company is not prejudiced inasmuch as the agreed settlement with Mack was some \$300.00 less than what plaintiff Winget admits is owing to Mack. I am sure, also, that counsel would not deny that defendant Mack was dismissed from the action without prejudice to plaintiff Winget's claim in this respect on July 9, 1951, long after this appeal was set in motion.

Perhaps counsel for Standard will urge that if Mack had remained in the case the jury might have found against him on the issue of cooperation and therefore the only fund available to plaintiff Winget would be the \$10,000.00. Clearly this would be without merit as the issue was exactly the same in Mack's case against the insurance company as it was in Winget's, that is, did or did not Towry cooperate with the insurance company? The facts presented to the jury applied with equal force to both cases. Such claim by Standard would be especially without merit in view of the fact that in Mack's case in State Court there was no issue tendered in the case of *Mack v. Towry*, as to the question of intoxication [Tr. p. 46], the failure of Towry to tell the insurance company about having drunk some beer being the lack of cooperation the company claims. On the other hand, in plaintiff Winget's case in State Court against Towry, the issue of intoxication was tendered although an attempt to dismiss it from the case was made during the course of that trial. [Winget's Ex. for identification No. 5.]

It should also be noted that the defendant Mack and the plaintiff Winget asked exactly the same relief of the insurance company in their prayers, namely, that the \$20,000.00 be paid into Court. The issues to determine the granting of both prayers must necessarily be the same.

Thus, it is quite obvious that the jury having determined that Towry cooperated with the company in so far as Winget is concerned, it is conclusive upon the defendant Standard that Towry also cooperated with the insurance company in so far as Mack was concerned. It is therefore definite that a total fund of \$20,000.00 is available for payment on the \$47,000.00 worth of liability.

Authorities Supporting Theory.

The authorities hereinafter set forth fully sustains the plaintiff Winget's arguments above. They shall be divided into the following subdivisions: 1. Measure of liability. 2. Injunctive relief. 3. Payment relieves company of liability and 4. Equitable principles of pro-ration.

1. *Measure of Liability.* The case of *Hobson v. Mutual Benefit H. & A. Assn.*, 99 Cal. App. 2d 330 (1950), affirms the well recognized rule that in construing an insurance policy it must be borne in mind that where two constructions are reasonable, that which is more favorable to the insured should be adopted. Also, that the policy should be read as a layman would read it and not as an attorney or an insurance expert might read it. Applying the rule of this case to the two paragraphs of the policy above quoted, the interpretation would be that a fund of \$20,000.00 is available to satisfy in part the obligations of the assured Towry. Any layman reading the first paragraph of the conditions would certainly gain the

impression that there was \$20,000.00 available to satisfy any obligations arising from any one accident where two or more persons were injured.

A little more puzzling situation would seem to arise in the interpretation of these clauses of the policy in the case where we assumed that Winget had obtained a judgment for \$12,000.00 and Mack a judgment for \$6,000.00. In such case the measure of liability of the insured's company is \$10,000.00 plus the amount of injury to the second person, \$6,000.00, making a total of \$16,000.00. See *7 Couch Encyclopedia of Insurance Law*, page 6232.

Thus, in *Mannheimer Bros. v. Kansas Casualty Surety Co.* (Minn. 1921), 184 N. W. 189, the assured used his insurance company to recover on a 5-10 policy where he had paid one judgment against him for \$2,630.00 and one for \$12,633.00. The insurance company paid \$2,630.00 to him and he contended that the excess over \$2,630.00 up to \$5,000.00 should be applied on the larger judgment making a total of \$7,630.00 to be applied on that judgment. The Court held he was entitled only to the \$5,000.00 to be applied on the larger judgment plus, of course, the \$2,630.00 which satisfied the smaller judgment. The total limit of the company's liability was therefore held to be satisfied for \$7,630.00 paid on the two judgments, plus interest, costs and attorney's fees.

Most of the reported cases dealing with an interpretation of like clauses in other policies have to do with consequential injuries suffered by husband or father for his loss because of his wife's or children's injuries suffered in an accident. This involves an interpretation of the "one person" clause of the policy. For instance, in *Perkins v. Fireman's Fund Ind. Co.*, 44 Cal. App. 2d 427, the wife was injured in an accident and obtained a \$30,-

000.00 judgment. (A second person was injured in the same accident and obtained a \$4,750.00 compromise. A 10-20 policy was involved. Thus, by the compromise before any judgment was obtained, the company relieved itself of \$10,000.00 worth of liability for \$4,750.00. No injunctive relief was sought by the wife in that case.) The husband sued in a second action with his wife for special damages, loss of services, medical expenses, etc. They obtained a judgment for \$6,999.98 and costs of \$15.25. The insurance company paid \$10,000.00 on the \$30,000.00 judgment plus interest and costs. The Court held that the insurance company was liable on the second judgment for only \$15.25 costs, pointing out that "one person" in a policy refers to the injured person and "one accident" to injury of several persons, regardless of how many may suffer loss by reason thereof. The husband, who was not injured, could get no recovery from the insurance company, the company having paid the limit of its liability to the wife and the second person injured in the accident. (The question of pro-ratio was not discussed.)

Likewise, in *Williams v. Standard Accident Insurance Co. of Detroit*, (5th Cir., La.) (April 11, 1951) the wife brought action individually and as tutrix of her two minor children for the death of the husband and father in an accident. A 5-10 policy worded like the one in the instant case was involved. The question was whether the limit of \$5,000.00 to "each person" means the person bodily injured in "each accident" or each person who thereby suffers damages. The wife and children were not involved in the accident. The Court held, approving *Gaines v. Standard Accident Insurance Company* (La. App.), 32 So. 2d 633, that the limit as to "each person" relates to a person suffering bodily injury and not to the person or persons

who may suffer damages in consequence of such injury. Therefore, in that case, the limit of liability of the company was \$5,000.00.

In *Employers Liability Assurance Corp.*, 180 La. 406, 156 So. 447, a father obtained judgment for \$6,457.00 in medical expense for his daughter who was injured and who obtained a \$30,000.00 judgment. A 10-20 policy was involved. The insurance company deposited \$10,000.00 in Court and the court held the liability of the company was thereby discharged and that the father could not claim \$20,000.00 was the limit of the policy because that limit was for bodily injuries or death of more than one person and that if it were one accident causing bodily injuries or death to more than one person, then the limit of the liability would be increased from \$10,000.00 to \$20,000.00.

See also *Lumbermen's Mut. Cas. Co. v. Yeroyan*, 5 A. 2d 726 (N. H. 1939). In that case the husband was denied recovery for consequential injuries he suffered by reason of bodily injuries to his wife.

Next, on this question of the measure of liability of the insurance company in this case, the Appellate Court's attention is directed to paragraph 11 of the conditions, page 3 of the policy reading as follows:

"Action Against Company—Coverage A—No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, *nor until the amount of the insured's obligation to pay shall have been finally determined* either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

“Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy *to the extent of the insurance afforded by this policy*. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured’s liability.

“Bankruptcy or insolvency of the insured or of the insured’s estate shall not relieve the company of any of its obligations hereunder.” (Emphasis mine.)

In our case, the liability of Towry to pay has definitely and finally been determined at \$47,000.00. The “extent of the insurance afforded by this policy” is clearly \$20,000.00 inasmuch as two persons obtained judgments, each having suffered bodily injuries. Thus, the measure of the company’s liability is \$20,000.00 under the clear and unmistakable language of its own policy. It matters not what the other provisions of the policy are so long as that \$20,000.00 is applied toward the satisfaction of Towry’s obligations.

Thus, in *Olds v. Gen. Acc. Fire, Etc. Corp.*, 67 Cal. App. 2d 812 at 819 in construing similar language in an insurance policy, the Court points out that the person injured and with a judgment suing an insurance company is bringing an action to be reimbursed for damages suffered, the amount thereof having been fixed by final judgment, and is not bringing an action to recover a loss suffered by him under the policy. (Incidentally, the Court in that case also points out that it is elementary that ambiguous provisions of an insurance policy should be construed against the company.) In our case, we are not interested in any of the technical provisions of the policy.

Our action is not *on* the policy but *for* the asset of \$20,000.00 that it affords.

Our action is much like that in the case of *McNulty v. Conn. Mut. Life Ins. Co.*, 46 Fed. 305. In that case, an action was brought by an administratrix against the insurance company on a policy of insurance on the life of her intestate, in which one claiming the policy as an assignee was made a party defendant. The Court stated as follows:

“According to the theory of the action as set forth in the petition filed therein, both the administratrix and Duncan have an interest in the single claim against the insurance company, and it is proposed to settle the liability of the company on the policy, and then, if such liability is established, to determine the shares or interests belonging to the claimants.”

2. *Injunctive Relief.* The authorities support Winget's theory that she is entitled to enjoin Standard and Mack from settling Mack's case. It seems clear that Winget, having obtained her judgment in State Court, has a property interest in the \$20,000.00 fund entitling her to such injunctive relief.

A note in 49 *Harvard Law Rev.* page 658 points out that most courts refuse equitable relief by way of injunction to *non judgment* claimants attempting to enjoin an insurance company from compromising claims of other claimants. The note states that if the statute prevents the insurance company from canceling the policy it would seem to give the injured party a beneficial interest in the proceeds. (Under condition 11 of the policy in our case, the reduction of the claim to judgment entitles the claim-

ant to sue the insurance company. Thus, there is a direct liability to the claimant and he has a beneficial interest in the fund by the insurance contract itself.) The article seems to favor injunctive relief, pointing out that an insurance company should not have the power to decide which injured party should be paid because they could coerce claimants into unfavorable compromises by threatening to exclude them altogether.

Another article in 11 *N. Y. Univ. Law Quarterly Rev.*, page 447 at 451 concludes that legislation should be enacted in multiple injury cases requiring insurance companies to notify all claimants of any proposed settlement and any claimant could enjoin settlement if he was not satisfied therewith and contend that he claims a disproportionate share of the fund as going to other claimants. The conclusion dealt only with non-judgment holders.

In *Turk v. Goldberg* (N. J. 1920), 109 Atl. 732, a statute provided that a bus owner must have a policy in the sum of \$5,000.00 against injuries and it "shall be for the use and benefit of every person suffering loss, damage or injury." A non-holder sought to enjoin payment by the insurance company of further payments on a policy, (\$2,800.00 was left unpaid), contending that the money should be paid to the Clerk of Court for distribution to all persons injured. The Court pointed out that every person injured has an inchoate lien on the policy which inchoate right can ripen into an actual lien only by recovery of final judgment against the assured and such liens have priority in the order in which they mature and are presented to the insurance company. In our case, the judgments matured on the same day and at the same time so the liens arose at the same time and in the particular facts of our case, injunctive relief is more than ever in

order. What the rule should be when one judgment is obtained some time after another is immaterial to our case. However, under such situation, if the first judgment holder had done nothing toward the collection of his judgment it would seem that the second could bring the policy of insurance within the jurisdiction of the Court and thereby establish his lien and enjoin any settlement with the first judgment holder and request pro-ration. It would seem that until the policy is actually brought into Court by some affirmative action against the insurance company no lien actually has come into existence.

In *Ward Trucking Corp. v. Philadelphia Nat. Ins. Co.*, 67 A. 2d 480 at 483, the Court held in a suit by plaintiff against the insurance company, where the insurance company asked pro-ration in a counter-claim against plaintiff's claim and several other claimants whose claims had not and were not being pressed, that the insurance company could not pro-rate, pointing out that other claimants might never press their claims. Plaintiff in that case was held entitled to the full limit of the policy for one claimant. The case is authority for the rule that until a judgment is obtained by other claimants, a judgment holder may enforce his claim for the full limit available for one person injured. Likewise, in our case, if Winget were the only judgment holder, the funds available for payment of her judgment would be only the sum of \$10,000.00, that being the only liability fixed against the company by a final judgment. It would seem that she, with her judgment, could enjoin a settlement by the insurance company with Mack if he did not hold a judgment, at least to the point where there still remained \$10,000.00 liability left on the policy. However, once the liability of the company has been determined by judgments in favor

of Mack and Winget it is the total liability for the single accident, \$20,000.00, that has been determined as the funds available for payment and plaintiff Winget, with her judgment, would be entitled to injunctive relief against settling with Mack on that full liability rather than for just \$10,000.00 of it.

So far as this appeal is concerned, we are concerned only with what the rule should be where two judgments are obtained at the same time. The foregoing discussion of different situations than ours is presented merely as an aid to the Court in determining the effect on other situations of the rule to be applied in this case.

In *Bruyette v. Sandini, et al.* (Mass. 1935), 197 N. E. 29, the court pointed out that prior to the rendition of a judgment in favor of an injured party, such party had no property right in the insurance fund upon which equity would act to enjoin the insurance company from paying others who were injured in the same accident. However, after rendition of the judgment, the plaintiff had a property right in the insurance fund and therefore equity would intervene to aid the plaintiff in the protection of his property rights against the insurance company. The Court cited *Mathewson v. Colpitts*, 284 Mass. 581, 188 N. E. 601, to the effect that upon recovery of a judgment, the plaintiff had a right in the nature of a lien against the insurance company on the money due under the policy.

In *Pisciotta v. Preston*, 10 N. Y. S. 2d 44 (1938) the plaintiff, without a judgment, sued for himself and others to enjoin payment of judgments already granted in favor of others. The Court held that the plaintiff not having a judgment was not in a position to get injunctive relief, but pointed out that if he had had a judgment he could have obtained such an injunction.

3. *Payment Relieves Company of Liability.* The insurance company may contend that if, in a case like ours, they were required to pay \$13,600.00 to one claimant and \$6,400.00 to another, then they would still have a claim against them for \$3,600.00 from the second claimant. The authorities do not support such a contention.

The insurance company is completely relieved of liability when it pays the full extent of its liability as established by judgment or judgments. The cases seem clear that the company would be so relieved. This is so, even though there has been no pro-rata in paying several claimants.

Thus, in *Bartlett v. Travelers Ins. Co.*, 117 Conn. 147, 167 Atl. 180 (1933), the defendant insurance company was sued on a \$10,000.00 judgment on its policy limiting its liability on account of one accident to \$10,000.00. The insurance company had theretofore settled with two other claimants in the same accident until there was only \$3,750.00 left available under the policy when the plaintiff obtained his \$10,000.00 judgment. The Court held that the insurance company was authorized to compromise and settle multiple claims and the amount of such settlements was deductible from the limited liability in determining the liability to the injured party on the judgment. Applying the facts of that case to the case now before the Court, it is obvious that if Standard had settled out of Court with Mack on his judgment for \$8,000.00 or had paid Mack \$8,000.00 without getting a full release for its \$10,000.00 of liability to him, the most that plaintiff would be entitled to under any theory would be \$12,000.00 instead of the \$13,617.02 that she is claiming. By injunctive relief we prevent such an irreparable loss to her.

In the *Bartlett* case, the Court pointed out that up to the time when judgment is rendered for him in an action against the assured, a claimant has only an inchoate right against the insurer.

The only case holding an insurance company *may* be liable for more than its limited liability is the rather indecisive rule in Texas (definitely a minority decision on that question alone) established in the case of *Darrah v. Lion Bonding & Surety Co.* (Texas 1918), 200 S. W. 1101. In that case the insurance company paid the full extent of its liability to 3 claimants. A fourth claimant instituted suit after the other three had obtained judgments but before the insurance company had paid the other three. The insurance company then paid the first three claimants before a decision in the case. The Appellate Court held that the insurance was for the benefit of all persons injured in the same accident and, as the amount was insufficient to satisfy all claims, it should be prorated in proportion to the amount of damages sustained by each and that the plaintiff would have been entitled to share in the amount of insurance if he had intervened. The Appellate Court then held that the trial court should have submitted to the jury the question of estoppel because of plaintiff's negligence in not bringing suit in time and reversed the trial court as to the insurance company for a new trial on that issue.

85 *A. L. R.* 39 points out that on a suit against an insurance company, the injured party may recover just what the insured might have recovered if the judgment had been fully satisfied by the insured, that is, not to exceed the limit of the policy. The annotation cites *Strafiotis v. Cal. Highway Indem. Exch.* (1930), 107 Cal. App. 522, 290 Pac. 628, in support of this statement.

See also *Employers Liability Assurance Corp.*, 180 La. 406, 156 So. 447 and *Perkins v. Firemans Fund Indem. Co.*, 44 Cal. App. 2d 427 and *Hyer v. Inter-Ins. Exch.* 77 Cal. App. 343 all holding that upon payment of the full extent of the insurance company's liability on its contract it is relieved of any further liability.

In the case of *O'Donnell, et al v. New Amsterdam Cas. Co.* (R. I. 1929), 146 Atl. 770, several plaintiffs brought action to recover on judgments totaling \$55,000.00. A 10-20 policy was involved. Several claims were still pending for trial but these had judgments and had agreed upon a distribution of the proceeds. (The question of priority did not therefore arise. Apparently they had agreed pro-rata as the Court awarded the money "on account of judgment"). The Court held the insurance company was discharged from further liability on paying the full amount of its liability. (The Court also held that the fund was available to those who prosecuted their judgments in accordance with the usual practice respecting judgments. This indicates in our case that diligence on the part of the plaintiff Winget in subjecting the assets of the policy to pay her judgment should entitle her to injunctive relief.)

In *Stotlove v. Fidelity & Cas. Co.*, 157 Misc. 106, 282, N. Y. Supp. 263 (N. Y. 1935), the action was by plaintiff against the insurance company, which had paid the full limit of the policy to one of decedent's representatives, who had first recovered judgment. The policy was a \$10,000.00 for one person and \$10,000.00 for one accident. The Court held that the company's liability was thereby relieved.

4. *Equitable Principles of Pro-ration.* On the question of pro-ration there is not an abundance of authority but wherever the question was discussed the courts have held that the fund should be pro-rated in accordance with the size of the respective claimant's judgments. It is obvious that the plaintiff Winget was the more seriously injured in the accident and the only basis upon which we determine how much more seriously is the amount of her judgment as compared to the amount of the judgment in favor of Mack.

A case directly in point on the subject is *Century Indem. Co. v. Kofsky, et al.* (Conn. 1932), 161 Atl. 101. In that case there were 4 judgment holders, one with a judgment for \$8,886.00 (\$2,200.00 of which was property damage, the balance personal injuries), one for \$5,000.00 for death, one for \$15,000.00 for personal injuries and the fourth for \$4,500.00 for personal injuries. The insurance company interpleaded the four judgment holders. The policy was a 5-10 policy. The Court at page 103 stated as follows:

“Where several creditors are restricted for satisfaction of their claims to a single fund inadequate to pay all, the general rule adopted is that of equality. Examples are claims against insolvent estates of deceased persons and against insolvent debtors, claims in receivership, and rights of sub-contractors under the mechanic's lien law—Whenever several persons are entitled to participate in a common fund, or are all creditors of a common debtor, equity will award a distribution of the fund, or a satisfaction of the claims, in accordance with the maxim, Equality is Equity; in other words, if the fund is not sufficient

to discharge all claims upon it in full, or if the debtor is insolvent, equity will incline to regard all the demands as standing upon equal footing and will decree a pro-rata distribution or payment—Justice requires that they (injured parties) share in equal proportions in the sums due under it (the policy) on account of the particular kind of injuries suffered.”

The above case has been traced through Shepards Citor to September of 1951 and is still sound law. In that case, the judgments were procured at different dates and in the different amounts above set forth. The Court would not pro-rate on the basis of the date of acquiring judgment, stating that it would make for a race to litigate first, burdening the courts. In that case the policy was placed before the Court by the insurance company. *The only difference in that case and the one before this Court lies in the fact that the policy has been brought before the Court in this case by plaintiff Winget. Just because Winget seeks the relief instead of the insurance company should make no difference whatsoever.* The equitable, fair and legal thing to do in either case is to make a pro-rata distribution.

At 28 *Ill. Law Rev.* page 576 at 578, concludes that if plural claims are reduced to judgment, the most obvious solution is to compel pro-rata apportionment of the insurance fund.

43 *Yale Law Journal*, 136 at 139 concludes as follows:

“All claims reduced to judgment and all settlements, when their sum exceeded the coverage of the

policy, should be satisfied pro-rata, according to the amounts of the respective settlements or judgments—This procedure of dealing with all claimants as a group should be required even though the insured appears to be solvent and able to pay any judgment above the coverage of the policy.”

In *Brill v. Foshay Co.*, 65 Fed. 2d 420 (8 Cir. Minn.) the Court held at 424 that equity will not lend its aid to one whose sole ground for seeking such aid is based upon a technicality, stating that it is axiomatic that in the absence of relations or conditions requiring a different result, equity will treat all members of a class as upon an equal footing and will distribute benefits either equally or in proportion to the several interests, and without preferences.

In *Green v. Bankers Ind. Ins. Co.*, 84 Fed. Supp. 504, affirmed in 181 F. 2d 1, a widow sued individually for her damage because of her husband's death and also as guardian of three children. The judgment was for \$15,000.00 against the insurance company on its policy in that amount. (That was the limit.) The Court apportioned the \$15,000.00, $\frac{1}{2}$ to the widow and the other $\frac{1}{2}$ among the 3 children in accordance with their ages.

Undoubtedly counsel for defendant Standard will cite cases where no apportionment was made but a careful examination of these cases will readily disclose that apportionment was never raised as an issue and was not even discussed.

Interest Is Due on \$32,097.80.

Section 3757 (1) *General Laws of California* provides that the rate of interest upon any judgment rendered in any Court in this State shall be 7% per annum. Thus, Towry is obligated to pay interest on the full amount of the judgment against him in the sum of \$32,097.80.

Paragraph II of the insuring agreements, page 2 of the policy reads as follows:

“Defense, Settlement Supplementary Payments—
As respects such insurance as is afforded by the other terms of this policy under coverage A *the company shall*

“(a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

“(b) *pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;*

“(c) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company’s request.

“The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.” (Emphasis mine.)

It seems quite clear after reading just the portion of the paragraph above in italics (which portion is the only part under consideration at this point) that the company has agreed to pay all interest on the judgment against Towry in the sum of \$32,097.80 *in addition* to the applicable limits of liability of the policy. If the company had intended that the words “all interest” should refer only to interest on the part of such judgment as shall not exceed the company’s liability thereon, it would have said so in the policy. It seems to mean just what it says, namely, the company agrees to pay all interest “incurred” until the company shall pay such part of such judgment as does not exceed its liability. The only person who has “incurred” interest is the assured Towry and he certainly has incurred the interest on the full \$32,097.80 from the 30th day of March, 1950.

The words “such part of such judgment” certainly must refer to the principal of the judgment that the company is liable for. This is especially true when we consider that the California statute in effect at the time of the accident, *Section 420, Vehicle Code*, and now in effect, *Section 422.6, Vehicle Code*, both read that liability policies must provide for a limit “exclusive of interest and costs” of not less than \$5,000.00.

Paragraph 4 of the conditions, page 3 of the policy, provides that the insurance afforded by the policy shall

comply with the provisions of the Motor Vehicle Financial Responsibility Law of this State, the sections above mentioned being part of that law. Thus, by legislative enactment and the terms of the policy itself, the full limit of the company's liability is pledged for payment on the principal of the judgment and interest is payable over and above that principal payment. Therefore, we conclude that when the company has paid "such part of such judgment as does not exceed its liability" those words refer to the principal sum due under the policy and when that sum has been paid, all interest on the entire judgment ceases.

Counsel for defendant Standard will undoubtedly cite *Sampson v. Century Indem. Co.*, 8 Cal. 2d 476, 109 A. L. R. 1162. The clause before that court for consideration was, so far as this case is concerned, exactly the same as the clause in this case *except* the clause in the *Sampson* case did not contain the last sentence of the clause in our case above quoted. In other words, the words "the company agrees to pay the amounts incurred under this insuring agreement, except settlement of claims and suits, in addition to the applicable limit of liability of this policy" are not contained in the policy before the court in the *Sampson* case. (Incidentally, that case was decided long before the California Financial Responsibility Act was enacted.)

In the *Sampson* case, the court held that the words "all interest" mean all interest on that part of the judgment for which the company is liable and not interest on the entire judgment. The court said "it hardly seems probable, therefore, that the parties to the policy of insurance, after expressly limiting the liability of the company to the principal sum of \$10,000.00 intended to make

it liable for interest on any greater amount. Surely we would not be justified in so construing the policy unless it contains language *clearly expressing such an intention.*" (Emphasis mine.)

In the policy now before the court such an intention is clearly expressed when the insurance company states that it agrees to pay interest on the judgment "in addition to the applicable limit of liability of this policy." The annotation at the conclusion of the *Sampson* case in 109 A. L. R. points out that it depends upon the language of the policy as to whether interest is payable on the full judgment or on just a portion of the principal the company is liable for.

A case directly in point is *New Jersey Fidelity & Plate Glass Ins. Co. v. Clark*, 33 F. 2d 235. There, the policy provided that the company would pay, irrespective of the limits of liability, all costs taxed against the assured in any legal proceedings defended by the company pursuant to the policy and all interest accruing after entry of judgment in such proceeding. In that case, judgment was recovered for over \$50,000.00 with costs. The policy limit was \$10,000.00. The court held that the plaintiff was entitled to interest on the full amount of \$50,000.00 and costs by reason of the express statement in the policy. At page 236 of that case, the court stated as follows:

"An examination of different policies brought to this court discloses that they usually contain a provision limiting the right to recover interest to that portion of the judgment which the company has obligated itself to pay; but the policy in suit contains no such limitation, and *we do not feel at liberty to insert such a limitation into the policy so as to make a new contract for the parties.*" (Emphasis mine.)

The court in that case held that the language in that policy was not free from ambiguity, but it was the language of the company and must be construed most strongly against it.

A policy similar to the different policies examined by the court in the New Jersey case and limiting interest to only the principal sum owed by the company was discussed in *Strafiotis v. Highway Indem. Ex.*, 107 Cal. App. 522. There, the policy had a provision that the company would pay interest "upon such part of said judgment as shall not be in excess of the limits of the liability." Obviously, in the face of that express language the court could not award interest on anything but the limit of the company's liability. See also *General Acc. Fire & Life Assur. Corp. v. Clark*, 34 F. 2d 833, where the same express limit was inserted in the policy. Surely defendant Standard, a large corporation writing insurance policies as far west in the United States as is possible, must have known of these decisions and if they had intended to limit their liability for interest to just the principal sum due under their policies they certainly would have said so in the policy. All they would have had to insert would have been the words "interest on such part of such judgment as does not exceed the limit of the company's liability hereunder." This they did not do but instead, agreed to pay all interest incurred *in addition* to the limits of the company's liability.

In the case of *Hobbs v. Employers Liability Assur. Corp.* (La), 188 So. 748 (1939), the provision regarding interest read almost exactly as the one in the case before the court. There the clause read as follows:

"All interest accruing after entry of judgment until the company has paid, tendered or deposited in

court such part of such judgment as does not exceed the limit of the company's liability thereon . . . the company agrees to pay the expenses incurred under divisions (a) and (b) of this section *in addition* to the applicable limit of liability of this policy." (Emphasis mine.)

The court then held that the above clause clearly showed interest from date of judgment shall be paid by the insurer "over and above, and in addition to, the limit of its liability on the policy."

Conclusion.

From the foregoing it seems conclusive that the only equitable, fair and reasonable method of allotting the full liability of the company is to require the insurance company to pay into court the sum of \$13,617.02 for disbursement to plaintiff Winget and to require also that the insurance company add to that amount interest on the full sum of \$32,097.80 at 7% per annum from the 30th day of March, 1950.

Respectfully submitted,

NEIL D. HEILY,

*Attorney for Appellant and Cross-Appellee
Winget.*

No. 13047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,
MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant;

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,
MICHIGAN, and THOMAS B. MACK,

Appellees.

Brief of Appellant Standard Accident Insurance
Company.

FILED

NOV 12 1951

FULCHER & WYNN,

411 West Fifth Street,

Los Angeles 13, California,

PAUL E. O'BRIEN

CLERK

Attorneys for Appellant and Cross-Appellee.



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**Brief of Appellant Standard Accident Insurance
Company.**

Basis of Jurisdiction.

Pursuant to Rule 20, subdivision (b) of this Court, this appellant, Standard Accident Insurance Company of Detroit, Michigan, hereafter for convenience referred to as Standard, presents its statement of the pleadings and

facts disclosing the basis upon which it is contended that the trial court had jurisdiction and that this court has jurisdiction to review the judgment.

Vivian Winget and Thomas B. Mack recovered judgments against one Billie Ray Towry in the Superior Court of the State of California, County of Ventura, for injuries arising out of an automobile accident.

Upon non-payment of her judgment Vivian Winget, herein for convenience called Winget, brought a supplemental action to enforce collection of said judgment from Standard upon allegations that the judgment debtor Towry was covered at the time of the accident by a public liability automobile insurance policy issued by Standard. Winget also named as a defendant in said action the said Thomas B. Mack and prayed that Standard be enjoined from making any payment on account of Mack's judgment until final settlement of the Winget claim.

Upon petition of Standard, said action pending in the State Court was removed to the United States District Court upon the grounds set forth in said motion that Winget and Standard were citizens of different states; that the amount in controversy between them, exclusive of interest and costs exceed \$3,000.00; and that the claim of Winget against Mack was one which might under the law be heard and determined by the said United States District Court. [T. R. pp. 3-6; 28 U. S. C., Secs. 1332 and 1441 (c).]

Statement of the Case.

Appellant Standard presents the question whether it may be held liable by a third person holding a judgment against its insured where the insured has made false statements to Standard concerning circumstances relating to an automobile accident. Do such false statements violate the insured's duty to cooperate?

This question is herein presented in the following manner: Winget holds an unsatisfied judgment against one Billie Ray Towry for injuries resulting from an automobile accident on January 26, 1949, when Winget was a passenger in Towry's automobile. [T. R. p. 30.]

Standard, in this action presented the defense that the insured Towry failed to cooperate with Standard as required by conditions of his policy. [T. R. p. 17.]

Standard moved the trial court for an order directing the jury to find in favor of Standard and after the trial court's refusal and the following verdict of the jury in favor of Winget, moved said trial court for judgment, notwithstanding said verdict. Both of these motions were denied. [T. R. pp. 222-224 and 264.]

Appellant Standard insists that the admittedly false statements made by its assured prior to the trial of the suit in the State Court were prejudicial to Standard and constituted violations of the cooperation clause which was a condition of its policy of insurance so as to constitute a defense to Standard as a matter of law. This cooperation clause is printed in his policy as Condition No. 8, which policy is in evidence as Winget's Exhibit 4. While the policy has not been printed in the Transcript, it was made a part of the record.

Specification of Errors.

Pursuant to Rule 20, Subdivision (2) (d), Appellant Standard specifies as errors committed by the trial court the following:

I.

In view of the uncontradicted testimony of the insured that he had made false statements of facts relating to the accident, the court erred in its denial of Standard's motion for a directed verdict. [T. R. pp. 222-224.]

II.

In view of the fact that there was no conflict in the testimony that the assured made such false statements, the court erred in refusing to grant Standard's motion for judgment, notwithstanding the verdict. [T. R. pp. 243-257, 264.]

III.

In permitting testimony as to what reasons the assured gave to his personal attorney for changing his deposition. [T. R. pp. 99 and 100.]

The substance of the evidence admitted and the grounds urged at the trial for the exclusion of the same are contained in the following excerpt from the Transcript of Record. [T. R. pp. 99 to 101.]

"Q. (By Mr. Heily): At the time Mr. Towry made the changes in the deposition, did he discuss with you the reasons for making the changes? A. Yes, he did.

Q. What did he say?

Mr. Wynn: Well, I think I will object to that as hearsay, not made in the presence of any persons representing the defendant.

The Court. I think I will overrule the objection.
Mr. Wynn: Very well.

The Witness: We had a lengthy discussion of this, Mr. Heily. It lasted probably two hours. It was a year ago and I don't remember everything that was said, but I do recall asking him to tell me in detail everything that happened on the day of this accident, which he did. I asked him in particular about drinking, whether he had had anything to drink, and if so, what, and he told me he had had a small quantity of beer during the day and nothing else to drink. I asked him what he had told the insurance company and why they were attempting to withdraw from the case, if he knew.

He explained to me in his deposition he had indicated he had not had any intoxicating liquor to drink.

I was concerned about that and asked him why, what the circumstances were when the deposition was given.

He stated to me that he had not had any opportunity to talk with counsel for the insurance company prior to the giving of the deposition, that he met his attorney, went into Mr. Hollingsworth's office, and they immediately started asking him questions, and when they came to the question of intoxicating liquor, he wasn't sure in his own mind whether beer was within the category of intoxicating liquor; that he wanted to protect the insurance company as much as he could, and he just said no, he hadn't had any intoxicating liquor to drink.

I then explained to him I thought it of the utmost importance that he correct his deposition until it stated the actual and absolute truth, I thought that was his duty, and he agreed that he would do so.

Then I went through the deposition with him in detail, question by question, and asked him exactly

what the facts were, and when he came to any answer that he considered not wholly accurate, I had him write in his own handwriting the correction on the face of the deposition.

In addition to that, I had quite a lengthy discussion with him about this technical point, as to whether the insurance company lawyers could withdraw from his defense. I don't know whether you want me to go into that."

IV.

In refusing admission in evidence of Standard's Exhibit "D" for identification [T. R. p. 124] and in rejecting offer of proof of same matter. [T. R. pp. 187-188.]

The substance of this offered Exhibit and the evidence submitted by offer of proof was a statement made on a form provided by Standard with typewritten additions, all to the effect that the assured "had not been drinking." (This offered Exhibit is included in the record on appeal but has not been printed in the Transcript.)

The grounds urged at the trial in objection to the admission of said evidence are quoted as follows [T. R. pp. 123-124]:

"Q. Now, Mr. Towry, where were you when this statement was presented to you to sign? A. I was in the hospital, Lying-in Hospital in Oxnard.

Q. What was your condition of health? A. I don't remember signing it. This guy brought it in from the Automobile Club, and I recognized him. That is when I signed the document.

Q. Were you in the hospital for what injury? A. I had a cut on my eye—

Q. The accident was January 26? A. January 26.

Q. And this was the 28th when he came in to see you? A. It was.

Q. At that time, did he hand you the document for reading? A. No, I did not read it.

Q. You did not read it? A. He said it has to be in Sacramento within 10 days after the accident, and he was from the Automobile Club, so he filled it out and I signed it.

Q. He filled it out and you signed it without reading it? A. I did not read it.

The Court: May I ask a question? Was it read to you?

The Witness: No, sir.

Q. (By Mr. Heily): Do you recall anything that was stated in it, or have you ever read it? A. No, sir, I have never read it.

Q. You don't know anything that is in it? A. I don't know.

Mr. Heily: I will object to the admission, your Honor, under the circumstances. No proper foundation.

Mr. Wynn: The foundation is there. The person has signed the document.

The Court: Supposing he says he has never read it, it was not read to him, he was in the hospital and somebody came in and presented it to him and asked him to sign it? Do you think he is bound by the contents of the document?

Mr. Wynn: I think he is bound by it. He is a man over the age of 21 years.

The Court: I will sustain the objection."

And further [T. R. pp. 167-170]:

"By Mr. Wynn: Q. And you had given such statement to the Highway Patrol men prior to the

date of January 28, 1949, on which the report of accident signed by you and marked Defendant's Exhibit D for identification was signed? A. Yes, I believe so.

Q. Now, I will ask you to read on the reverse side of Defendant's Exhibit D for identification—

Mr. Heily: I am going to object to any further questions on this line as improper cross-examination.

The Court: Counsel has the right to ask the question. You may object to it being answered.

Mr. Heily: I am sorry.

Q. (By Mr. Wynn): —the typewritten information on the reverse side of Defendant's Exhibit D for identification as to the version of the accident given thereon, and ask you whether that is the version you gave to the California Highway Patrol officers.

Mr. Heily: I object as improper examination.

The Court: Overruled. You can answer yes or no.

The Witness: I don't recall what I told the Highway Patrol that night. I just remember seeing them there. I can't say it was over two hours after the accident. I don't know exactly when it was.

Q. You have read, however, from the exhibit now before you the statement as to the occurrences of the accident, have you? A. Yes.

Q. Do you agree with that version of the accident as stated on the exhibit before you?

Mr. Heily: Object to that as calling for a conclusion of the witness.

The Court: Sustained.

Mr. Wynn: May I be heard, your Honor? Now if I may be heard just a moment, we are confronted with an action in which the witness called by us is

a party interested in the outcome of the action and definitely interested, and he is a party to the contract. Now, I have called him as my witness by virtue of the fact that under the rulings of the court, the burden is upon me to prove our affirmative defense. That defense is based on what this witness will admit upon examination on the witness stand. I think that he is a party to the action in effect. He is a party for whose interest the action is maintained, in the first place, and, secondly, I believe I am entitled upon it appearing in evidence that the person in an adverse witness in effect, to cross-examine him, although called by me.

The Court: Let me ask you a question. Supposing that this witness had made a statement on which you could rely for the avoidance of your policy to a stranger, not to the insurance company, not to representatives of the insurance company, but to a stranger. Do you think that the insurance company can rely for the avoidance of a policy on a misstatement made to someone else other than the insurance company?

Mr. Wynn: Definitely I do.

The Court: Have you any authorities?

Mr. Wynn: If he made a misstatement to a person entitled to examine him upon it and that misstatement of fact is incorporated—

The Court: Does a highway patrolman have the right, as a matter of law, to examine the—he has the right to ask the question. If the witness doesn't answer, he has no way of forcing the witness to answer. It is purely voluntary. Does he have the right as a matter of law? The Highway Department wasn't representing the insurance company. If they were representing anybody, they were representing

the people of the State of California, including this witness.

Mr. Wynn: This is just whether your Honor should declare certain things immaterial after the accident.

The Court: If you have got an authority that says you can rely upon a misstatement made to a stranger, someone that is not connected with the insurance company, I will read it.

Mr. Wynn: I submit the fact that the document containing information passed to the third person was transmitted to the insurance company.

The Court: I am going to have to hold that the representation must be made to the insurance company, and the insurance company cannot rely upon a representation made to a stranger. (156.)

Mr. Wynn: Not wishing, of course, to inquire against the court's ruling, do I understand I may not inquire of this witness as to whether or not he did state he had had nothing intoxicating to drink upon being examined by anyone shortly after the accident?

The Court: Unless you can show this was a misrepresentation made to the insurance company or its legal representative.

Mr. Wynn: I offer to prove by the witness on the stand that—

Mr. Heily: If there is going to be an offer of proof, I suggest it be made out of the hearing of the jury.

The Court: Yes, I think your offer should be made outside the presence of the jury. You can wait until the 3:00 o'clock recess. Then I will allow you to make your offer of proof."

And further [T. R. pp. 187-188]:

“Mr. Wynn: I now offer to prove by the witness Billy Ray Towry that subsequent to the date of the occurrence of the accident, on or about January 26, 1949, in Ventura County and prior to the date of January 28, 1949, the witness gave a report to representatives of the California Highway Patrol, in which the witness reported that he had not been drinking.

I think that is the limit of what I could attempt to prove by this witness. The tie-in would be, of course, that the information came to the defendant, but I offer to prove by the witness those facts.

Mr. Heily: In respect to that, first of all, the witness has already testified he doesn't remember what he told the Highway Patrol.

Secondly, it is immaterial, incompetent, irrelevant, no proper foundation, not the best evidence. It is an attempt to impeach his own witness.

The Court: Well, now, your insurance policy provides only, if I can recall the subdivision correctly, that the insured shall cooperate with the company. It doesn't say he shall cooperate with anybody else. It doesn't say he shall cooperate with the Motor Vehicle Department. It doesn't say he should cooperate with the police officers. It doesn't say, even, that he shall cooperate with attorneys. It says cooperate with the company. I think you are bound by that provision. I don't think you can come in and say we can avoid the policy because the witness did not cooperate with a stranger to the action. So I am going to deny your offer of proof.

Mr. Wynn: Very well.”

ARGUMENT.

I.

False Statement by an Assured Under an Automobile Public Liability Policy Constitutes a Breach of the Cooperation Clause of Said Policy as a Matter of Law. (Referring to Specifications of Errors I and II.)

The assured and judgment debtor in the State Court, Billie R. Towry, admittedly testified falsely concerning consumption of alcoholic liquors, including beer, in his deposition given in the State Court action. [T. R. pp. 160-164.]

The trial court excluded a further statement made in Standard's Exhibit D for identification (included in record on appeal but omitted from Transcript of Record) to the effect that insured had not been drinking. This order of the court has been specified as an error herein. (Spec. Error IV.)

In addition, he gave a false statement over his signature which was submitted to appellant Standard on July 11, 1949, again stating that no one in his party had any intoxicating liquor to drink. [T. R. pp. 110-112.]

Under the decisions of the District Court of Appeal and the Supreme Court of the State of California, and under the decision of this learned Court hereafter cited, Standard urges that it was entitled to a judgment under the facts so revealed.

We respectfully refer to the following decisions:

- (1) *Valladao v. Fireman's Fund Ind. Co.*, a Corporation (13 Cal. 2d 322, 89 P. 2d 643). Decided April, 1939.
- (2) *Margellini v. Pacific Automobile Ins. Co.*, a Corporation (33 Cal. App. 2d 93, 91 P. 2d 136). Decided May, 1939.
- (3) *Wright v. Farmers Automobile Inter-Insurance Exchange* (39 Cal. App. 2d 70, 102 P. 2d 352). Decided May, 1940.
- (4) *Home Indemnity Co. of New York v. Standard Accident Ins. Co. of Detroit* (167 F. 2d 919, C. C. A. 9th). Decided May 11, 1948.
- (5) *Salonen v. Paanenen, et al.* (Mass., 1947), 71 N. E. 2d 227.

In the *Valladao* case referred to above it appeared that the owner of the insured automobile made a statement to the insurer shortly after the accident to the effect that he had not been driving the car at that time. His insurance company denied liability upon the ground that he had failed to cooperate as required by the terms of the policy [*ibid* p. 328]. The Supreme Court of California held that while what constitutes cooperation is ordinarily a question of fact, the question in that case became one of law because the insured knowingly and wilfully made a false statement concerning material facts [*ibid* pp. 330 and 331].

In the case of *Margellini v. Pacific Automobile Ins. Co.* (*supra*), the named insured under the policy failed to make any report whatsoever concerning the accident. In that case the California District Court of Appeal for the

Fourth Appellate District, refused judgment in favor of the injured third party holding that the failure of the assured driver to make a disclosure of information concerning the accident was a breach of the cooperation clause and that as a matter of law it was presumed that prejudice resulted to the insurer from such breach.

The case referred to above as No. 3, *Wright v. Farmers Automobile Inter-Insurance Exchange*, was also decided by the Fourth Appellate District of the California District Court of Appeal. In that case it appeared that the insured changed his version of the accident from that contained in his verified answer and the Appellate Court again held that this was a violation of the cooperation clause of the policy. In this case the Appellate Court reversed the judgment entered in favor of the injured plaintiff after the trial court had denied the insurer's motion for judgment notwithstanding the verdict.

Next we refer to the decision of this learned court in the case of *Home Indemnity Co. v. Standard Accident Ins. Co. of Detroit (supra)*. In the *Home* case it appeared that the assured, George White, gave several versions of the accident to his insurance company and in statements to attorneys. We respectfully quote the following language of this learned court as expressed by Honorable Circuit Judge Garrecht on page 924 of the Opinion:

“Truthfulness seems to be the keystone of the cooperation arch. The insured must tell his insurer the complete truth concerning the accident, *and he must stick to the truthful version throughout the proceedings.* He must not embarrass or cripple his insurer in its defense against a civil suit arising out of the accident by switching from one version to

another. He must not blow hot and cold to suit his personal convenience.” (Italics supplied by Court.)

Judge Garrecht quotes with approval language of the California Supreme Court in the *Valladao* case (*supra*) and also quotes from *Buffalo v. U. S. F. & G. Co.* (10th Circuit), 84 F. 2d 883 at 885, as follows:

“The Company is entitled however to an honest statement by the insured of the pertinent circumstances concerning the accident as he remembers them. Lacking that the company is deprived of the opportunity to negotiate a settlement or to depend upon the solid grounds of fact. *Nothing is more dangerous than a client who deliberately falsifies the facts.*” (Italics supplied by Court.)

It should be pointed out that in the *Home Indemnity Company* case now under discussion, as well as in the *Valladao*, *Margellini* and *Wright* cases determined in the Courts of California, the same conclusion was reached in each case: Where an assured has made misrepresentations or false statements concerning any matter involving the accident, such misrepresentations or false statements void his insurance policy as a matter of law and neither the Court nor a jury as a trier of fact can speculate as to what the outcome might have been or as to what action the insurance company might have taken had such misrepresentations or false statements not been made. (In this connection see *Home Indemnity v. Standard Accident Ins. Co. of Detroit* (*supra*), pp. 928 and 929.)

In all of the decisions cited by us, it appears, as in the case at bar, that the assured admittedly made conflicting statements. In the case at bar the assured stated in a written report given to appellant Standard that none of

the parties involved had used any intoxicating liquor, and later in his sworn deposition stated expressly that he had had nothing to drink, including, specifically, beer. Whether or not these statements were in fact false he subsequently recanted and admitted that on the day of the accident he had been drinking beer.

Presumably the jury in the instant case concluded that these statements by the assured were immaterial. We point out that this was the finding made by the learned District Judge, Honorable J. F. T. O'Connor, in the *Home Indemnity* case cited above, but as held by this Court the conclusion as to materiality is not one of fact but is one of law.

The fifth case to which we respectfully direct this Court's attention is *Salonen v. Paanenen (supra)*. There again the insured made conflicting statements as to the manner in which the accident occurred. Judgment in favor of the insurance company upon the suit of the injured party was affirmed upon the ground that the insured had failed to cooperate with the company in making such conflicting reports concerning the accident.

In each of the cases cited above the insurance company contended that there was a failure to cooperate in that its insured either failed to make any statement as in the *Margellini* case or made conflicting statements concerning the happening of the accident, or concerning facts incidental thereto. For example, in the *Valladao* case the insured first claimed that he was not driving the vehicle at the time of the accident. This fact however would not have affected the insurance coverage and the man who was driving the vehicle would have been entitled to coverage. On appeal before the California Supreme Court it was urged that under such circumstances the insurance

company could not possibly have been prejudiced since if it knew the facts at the time of trial it would have had no other defense. The Supreme Court however, as has each court represented in the decisions mentioned above, held that where an assured makes a wilfully false statement of facts involving the accident this amounts to a failure to cooperate with his insurance company as a matter of law and constitutes a complete defense in favor of the insurance company.

II.

The Court Erred in Permitting Towry to Explain Changes in His Deposition.

The witness, Willard, who was the personal attorney for Towry, was permitted, over objection by counsel for Standard on the ground that such testimony was hearsay, to testify that out of the presence or hearing of Standard or of its representatives, he, Willard, had a conference with his client Towry wherein Towry expressed personal opinions and beliefs and advanced reasons for giving the testimony he had originally given in his deposition. [T. R. pp. 99-101.]

This testimony was clearly hearsay and was objected to by Standard on such ground. [T. R. p. 99.]

Whatever may have been the personal motives or desires of Towry, the facts are that he did make conflicting and contradictory statements. As observed by this court in the *Home Indemnity* case, neither the court nor jury is permitted to speculate as to what the outcome might have been had he not done so.

III.

**The Court Erred in Excluding Standard's Exhibit D
and Its Offer of Proof of a Statement Contained
Therein.**

As previously noted, this Exhibit D which was offered by Standard, has not been included in the printed Transcript, although it will be found in the record certified to this court.

The only pertinent portion of this Exhibit is the statement of insured, which will be found on the reverse side thereof, "I had not been drinking."

Admission of this document was refused by the court on the ground that the statement had been first given to California State Highway Patrolmen, and was passed on by them to Standard. The trial court held that Standard could not rely on such statement made to third persons. [T. R. pp. 167-170.]

Later, during the trial, Standard offered to prove by the witness Towry that Towry did give a report to representatives of the California Highway Patrol in which he stated that he had not been drinking. Such offer of proof was likewise refused on the ground that a false statement made by an assured to attorneys or police officers would not tend to show non-cooperation with the insurer. [T. R. pp. 187-188.]

We submit that such evidence was vital and pertinent to the issue, whether insured had made conflicting statements concerning material facts. If the assured made a false statement concerning any such fact to any one he could have been confronted with such statement before a court or jury.

If the insured had spoken the truth at the earliest possible moment in his said Accident Report, the insurer would have had an opportunity to conduct settlement negotiations prior to filing of suits.

On the authorities cited at length in Section I of this argument, Standard submits that it should have been permitted to prove that the statement referred to was made by the insured and was relied on by Standard, just as it relied on the later written statement admitted in evidence as Defendant's Exhibit E and the testimony given by assured in his deposition in the State Court action before his alleged correction thereof, which deposition was admitted in evidence as Defendant's Exhibit A.

Conclusion.

On the occasion of every contact between the insured Towry and any representative of his insurance company, up until the very eve of trial, Towry asserted that he had not been drinking on the day of the accident. Then when confronted by statements to the contrary made by other members of his party, he changed his story. The insurer Standard, was thus placed in a position where it could expect that its insured might be charged with perjury or at the least, completely discredited before a jury.

This we assert is a material breach which voids coverage of the policy.

Respectfully submitted,

FULCHER & WYNN,

By CAROL G. WYNN,

Attorneys for Appellant and Cross-Appellee.

No. 13047.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,
MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,
MICHIGAN,

Appellee.

REPLY BRIEF OF APPELLEE, STANDARD
ACCIDENT INSURANCE COMPANY.

FULCHER & WYNN,

411 West Fifth Street,
Los Angeles 13, California,

Attorneys for Appellee.

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Appellee.

REPLY BRIEF OF APPELLEE, STANDARD ACCIDENT INSURANCE COMPANY.

Preliminary Statement.

The opening briefs of the Appellant Standard, and cross-appellant, Vivian Winget, appear adequately to present the facts involved and we will therefore proceed at once to reply to Winget's argument upon her appeal.

The propositions advanced by Winget are as follows:

1. Although the policy of Standard limits its liability for injuries to any one person to \$10,000.00, Winget should be entitled to recover a greater amount since the total judgments awarded to all persons injured in the accident exceed \$20,000.00, the limit of Standard's liability to more than one person arising out of any one accident; and

2. Conceding that Winget's judgment against Towry, the assured, exceeded any possible liability of Standard under the policy, Standard should nevertheless be held for interest upon the total amount of Winget's judgment.

We will reply to these arguments in order.

1. Standard's Insurance Contract Limits Its Liability for Damages Arising Out of Injuries to Any One Person to a Maximum of Ten Thousand Dollars.

For the convenience of the court we quote the pertinent provisions of the insurance policy [Winget's Exhibit 4, which has not been reprinted in the Transcript of Record]. These portions of the policy are contained in the face sheet entitled "DECLARATIONS", in paragraph I of the INSURING AGREEMENTS appearing on page 2, and in paragraph 1 of the "CONDITIONS", page 3 of said policy.

Paragraph VI of the DECLARATIONS provides:

"THE INSURANCE AFFORDED IS ONLY WITH RESPECT TO SUCH AND SO MANY OF THE FOLLOWING COVERAGES AS ARE INDICATED BY SPECIFIC PREMIUM CHARGE OR CHARGES. THE LIMIT OF THE COMPANY'S LIABILITY AGAINST EACH SUCH COVERAGE SHALL BE

AS STATED HEREIN, SUBJECT TO ALL OF THE TERMS OF THE POLICY HAVING REFERENCE THERETO.

COVERAGES	LIMITS OF LIABILITY		POLICY No.	PREMIUM
(A) Bodily Injury Liability	\$10,000	\$20,000	J 894065	\$20.70
	Each Person	Each Accident		
(C) Medical Payments	\$2,000			7.00
	Each Person— (Named Insured Included)"			

Upon page 2 of the Policy it is provided that Standard:

“Agrees with the insured, named in the Declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the Declarations and *subject to the limits of liability*, exclusion, *conditions* and other terms of this policy: (Italics supplied)

INSURING AGREEMENTS

“I. *Coverage A—Bodily Injury Liability*.....
To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.”

Turning next to the CONDITIONS of the Policy on page 3 the limits of liability quoted above are defined as follows in section 1:

“*Limits of Liability—Coverage A* . . . The limit of bodily injury liability stated in the declarations as applicable to “each person” is the limit of the com-

pany's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident, the limit of such liability stated in the declarations as applicable to "each accident" is subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident."

We respectfully call this court's attention to the language of the second clause of Section 1 of the Conditions quoted above, dealing with the limit of Standard's liability as to any one accident. Here it is provided that "subject to the above provisions respecting each person" the total liability for all damages arising out of injuries sustained by two or more persons may not exceed \$20,000.

We submit that the quoted language of the policy makes it perfectly clear that Standard assumed no liability in any event for damages arising out of injuries to any one person in excess of the sum of \$10,000, regardless of whether or not damages were also imposed upon the assured because of other injuries.

Certainly if Winget had been the only person injured in the accident who had recovered judgment against Towry, she could not claim more than \$10,000. This is conceded by Winget in her opening brief on page 12.

Winget argues however that since more than one person was injured in the accident her situation is improved. She asks the court to disregard the first clause of Section 1 of the Conditions, "*Limits of Liability*," and to hold

that whenever more than one person is injured the insurer becomes responsible for the limit of \$20,000, which is the maximum fixed for any one accident.

We contend that the simple, direct and complete answer to this argument is that the policy does not so provide.

Under the terms of the policy Standard may be responsible for damages as the result of injuries sustained by any one person to a maximum amount of \$10,000 and SUBJECT to this limitation may be liable for a maximum of \$20,000 for the total damages arising out of injuries to more than one person as the result of any one accident.

Appellant Winget, in her opening brief referred to the authorities which we submitted to the trial court and upon which such court relied in arriving at its decision as to the limit of Standard's liability.

We refer to 7 Couch Cyclopedia of Insurance Law, Section 1871, page 6232, reading as follows:

“Under a provision limiting liability on account of one person to \$5,000.00, with a limit of \$10,000.00 where more than one person has been injured, subject to the same limitation for each person, recovery cannot be had in excess of \$5,000.00 for injury to one person.” (Citing *McClung v. Pennsylvania Taximeter, etc.*, 25 Pa. Dis. Rep. 583.)

We call attention to the fact that in the case at bar, the policy of Standard limited its liability on account of injury sustained by one person to \$10,000.00, with limit of \$20,000.00 where more than one person might be injured in an accident SUBJECT to the same limitation for each person.

We also cited to the court below and rely on this appeal upon the case of *Mannheimer Brothers v. Kansas Casualty Co.* (Minn. 1921), 184 N. W. 189. In this case it appears that two persons had been injured by a truck owned and operated by plaintiffs. These injured persons brought suits, one recovering a judgment against the insured, Mannheimer Brothers, for more than \$12,000.00, and the other recovering a judgment for more than \$2,500.00. The insurance company in that case had in force an automobile liability policy, with limit of \$5,000.00 for damages arising out of injury to one person and with a limit of \$10,000.00 for damages resulting from injuries to two or more persons as a result of any one accident. After the insurer had denied any liability the insured, Mannheimer Brothers, paid in full the amount of the smaller judgment and recovered this payment from the insurer. Subsequently, the first and larger judgment was affirmed on appeal. The insured then paid that judgment and brought the reported action to recover the sum paid by it which was substantially in excess of \$5,000.00. The defendant insurer contended that the limit of its liability was \$5,000.00.

The policy involved provided:

“The Company’s liability under Paragraph 1 of the insuring agreements, on account of bodily injury to or death of one person, is limited to \$5,000.00 and subject to the same limitation for each person the Company’s total liability on account of bodily injuries to or death of more than one person as the result of one accident, is limited to \$10,000.00.”

The Minnesota Court then held:

“It follows therefore that the liability of defendant under the terms of the contract above quoted is limited to \$5,000.00 for each person injured and the trial court was right in so holding. This disposes of plaintiff’s further point that since in the Hanscom case the full \$5,000.00 was not used in paying his claim, plaintiff may claim the balance to the full amount of the insurance of \$10,000.00. To grant that condition would also amount to a judicial remodeling of the contract.”

Each of the authorities cited above are referred to by appellant Winget on page 17 of her brief, but we find therein no attempt to distinguish these decisions from the facts presented in the case at bar.

The only other authorities cited by said appellant Winget on this point are found on pages 16 through 21 of her brief. The first case is that of *Hobson v. Mutual, etc. Assn.* 99 Cal. App. 2d 330; (221 P. 2d 781) which holds only that in construing an insurance policy, a construction most favorable to an insured should be adopted. The case next cited is *Perkins v. Firemens Fund Ind. Co.*, 44 Cal. App. 2d 427; (112 P. 2d 670). As appellant Winget points out, this case did not discuss the matter of proration but held simply that the award made to an injured person for her injuries and the consequential damage award made to her spouse must be regarded together as damages arising out of injury to one person. Said appellant next cites *William v. Standard Accident Insurance Co.* without supplying a citation to any official report, but on page 18 states that the conclusion of the court was the same as in the *Perkins*’ case. To the same

effect are the cases of *Employers Liability Assur. Corp.*, 156 So. 447 and *Lumbermen's Mutual Casualty Co., v. Yeroyan*, 5 A. 2d 726.

In addition to the foregoing authorities, Winget cites on page 20 the case of *Olds v. General Accident, etc., Corp.*, 67 Cal. App. 2d 812, (155 P. 2d 676) but only to the point that the injured person suing the insurance company is not bringing an action to recover a loss suffered by him under the policy. This may be conceded but it is elementary that his claim upon the policy is measured by the terms thereof.

The last authority cited by said appellant is the case of *McNulty v. Connecticut Mutual Life Ins. Co.*, 46 Fed. 305. We submit that the cited case is in no respect analogous to the case at bar, since there the court was considering only conflicting claims of two persons to the net proceeds of a life insurance policy.

In her argument the appellant Winget concedes that regardless of how much her judgment against Towry might exceed \$10,000.00, the latter amount would be the limit of her recovery against Standard if no one else had been injured in the particular accident and had recovered a judgment therefor. (Appellant Winget's Opening Br., p. 12.) She nevertheless contends that if some other injured person should obtain a judgment likewise exceeding the sum of \$10,000.00, suddenly the liability of the insurer is no longer limited to \$10,000.00 on account of each injured person but becomes an indivisible liability in the total sum of \$20,000.00, which the court must distribute.

Perhaps the simplest reply to this contention is by posing the counter question, Why?

There is no language in the Standard policy supporting such a theory. On the contrary, Standard in simple language has limited its liability to \$10,000.00 for damages arising out of injury to one person and subject to that limitation, has gone further and provided that if more than one person shall have been injured, the total damages for which Standard shall be liable shall not exceed \$20,000.00.

Determination of this question of Standard's limitation of liability should dispose of this phase of the Winget appeal and we therefore refrain from any discussion as to whether the trial court erred in denying injunctive relief and as to what method or principles should have been employed if Winget were entitled to a recovery exceeding \$10,000.00.

2. Standard Is Responsible for Interest Only on Its Share of the Judgment Against Towry.

Appellant Winget quotes on pages 31 and 32 of her opening brief the policy provisions upon which she relies to support her claim that she is entitled to recover interest from Standard upon the total amount of her judgment against Towry. At the same time she, of course, concedes that under no circumstances would Standard be liable for the entire principal amount of such judgment.

The language so quoted by said appellant is found on page 2 of the policy and is contained in Paragraph II of the INSURING AGREEMENTS.

We submit that the answer to her contention will be found in reading this portion of the policy.

We respectfully point out that in the opening sentence of said Paragraph II of the policy, the obligations assumed in the subdivisions thereof are qualified and limited by the following language:

“As respects such insurance as is afforded by the other terms of this policy under Coverage A . . .”

Thus the assumption in subdivision (b) of responsibility to pay all interest accruing after entry of judgment is limited to the insurance afforded by the policy, which insurance we have previously shown is limited to the sum of \$10,000.00 for damages arising out of injuries to one person. All of the supplemental and additional benefits assumed in paragraph II are referred to such amount of insurance as is otherwise provided by the policy.

Appellant Winget argues that the concluding sentence of said paragraph II expresses a further assumption of liability. We submit that such language only serves to make clear that Standard's obligations already assumed in said paragraph for costs, interest and other expenses are obligations assumed in addition to the specified limits. The addition of this last mentioned sentence of paragraph II does not purport to extend the liability assumed in said subdivision (b) relating to interest.

In this light, the authorities cited and relied upon by us in the District Court must control.

Sampson v. Century Indemnity Co., 8 Cal. 2d 476; (66 P. 2d 434), presented to the Supreme Court of California precisely the same claim presented by appellant Winget herein.

While the California Supreme Court observed that the entire policy of insurance was not before it, the court set

forth in its opinion part of the terms thereof and for the convenience of this court we have quoted below the provisions of the policy involved in the *Sampson* case in one column, setting forth in the other the provisions involved in the case at bar.

SAMPSON CASE

CASE AT BAR

<p>“to pay all costs . . . also all interest accruing after entry of judgment, until the company had paid, tendered, or deposited in Court such part of such judgment as does not exceed the limit of the company’s liability thereon . . .”</p>	<p>“pay . . . all interest accruing after entry of judgment until the company has paid, tendered or deposited in court, such part of such judgment as does not exceed the limit of the Company’s liability thereon, . . .”</p>
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In the *Sampson* case the only contention made on the part of the assured was that the insurer was liable for legal interest, not only on the principal sum which it was compelled to pay under the policy but on the entire amount of the judgment.

After referring to the language of the policy quoted above, the court held on page 480 of the official report as follows:

“‘All interest,’ as used in the provision above quoted, means all interest on that part of the judgment for which the company was liable, and not all interest on the entire judgment as contended by the appellant. To construe this provision to mean that the company had agreed to pay the interest to become due on that part of the judgment which the company was not legally liable to pay would be an unnatural and strained construction of this provision of the policy. In our opinion, the only fair and

reasonable inference to be drawn from this provision of the policy when considered with its other terms is that the company was to pay interest after judgment only upon that part of the judgment for which it was liable. So construed there is no ambiguity or uncertainty in the terms of the policy and therefore, the rule of construction contended for by appellant has no application."

The only suggestion made by appellant Winget that the *Sampson* case does not control is the fact that in the *Sampson* opinion it does not appear whether or not the policy contained a provision that the payments of interest were to be in addition to the applicable limit of liability under the policy. We reply by pointing out that in the *Sampson* case, it was conceded that the insurer was liable for and had paid interest on the amount of the judgment for which it was responsible, just as in the case at bar it is conceded that if Standard is responsible to Winget for the sum of \$10,000.00 it is likewise responsible for interest on said sum from the date of the original judgment.

We also submit the decision in *Malmgren v. Southwestern Automobile Insurance Co.*, 126 Cal. App. 135; (14 P. 2d 351). In that action the plaintiff and his wife had both filed actions against one Eddy for damages resulting from bodily injuries sustained by the wife as a result of an automobile accident. The defendant insurance company paid a final judgment recovered by the wife by payment of the total sum of \$5,367.50, principal and

interest, plus \$19.75 costs under the terms of a policy providing:

“The company’s liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to \$5,000.00. . . .”

The policy provided further that:

“The expenses incurred by the company in defending any suit, including the interest on the verdict or judgment and any costs taxed against the insured, will be paid by the company irrespective of the limits expressed above.”

The plaintiff husband who had likewise recovered a judgment against the assured, then brought this action to recover legal interest on the amount of his unpaid judgment, basing his claim on the policy provisions above quoted.

We respectfully direct this court’s attention to the language contained on page 140 of the official report as follows:

“Appellant would have us construe the clause of the policy relating to interest to mean that despite such payment in full to appellant’s wife, respondent was also liable for interest on appellant’s judgment against the assured ‘irrespective of the limits’ of the policy. We cannot agree with this construction for we are of the opinion that the ‘interest on any verdict or judgment’ which the company agreed to pay ‘irrespective of the limits expressed above’ had no reference to interest on the principal sum of any judgment for which principal sum the company was not in any manner liable. ‘Interest is the compensation allowed by law or fixed by the parties for the

use, or forbearance, or detention of money.' (Civ. Code, sec. 1915.) The only logical construction to place upon the word 'interest,' as used in the above-mentioned policy, is that it referred only to interest accruing on the principal sum of a judgment for which respondent was liable under the terms of the policy. To interpret the policy in accordance with the contention of appellant would lead to the absurd result of rendering respondent liable indefinitely for the payment of the accruing installments of interest upon an obligation of a third person for which obligation respondent was not in any manner liable. We do not believe that the rule of strict construction against the insurer may be invoked to sustain such an unreasonable construction."

Conclusion.

This court will of course bear in mind that Standard concedes no liability whatsoever to plaintiff herein and is in fact prosecuting its appeal to this court from a judgment in favor of Winget in the sum of \$10,000.00, plus interest thereon and plus costs. The purpose of this brief is to establish that under no circumstances will Standard be liable for any sum greater than the sum of said judgment.

Respectfully submitted,

FULCHER & WYNN,

By CAROL G. WYNN,

Attorneys for Appellee.

No. 13047.

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Appellees.

ANSWERING BRIEF OF APPELLEE AND APPELLANT VIVIAN WINGET.

NEIL D. HEILY,

202 Security Bank Building,
Oxnard, California,

*Attorney for Appellant and Appellee
Vivian Winget.*

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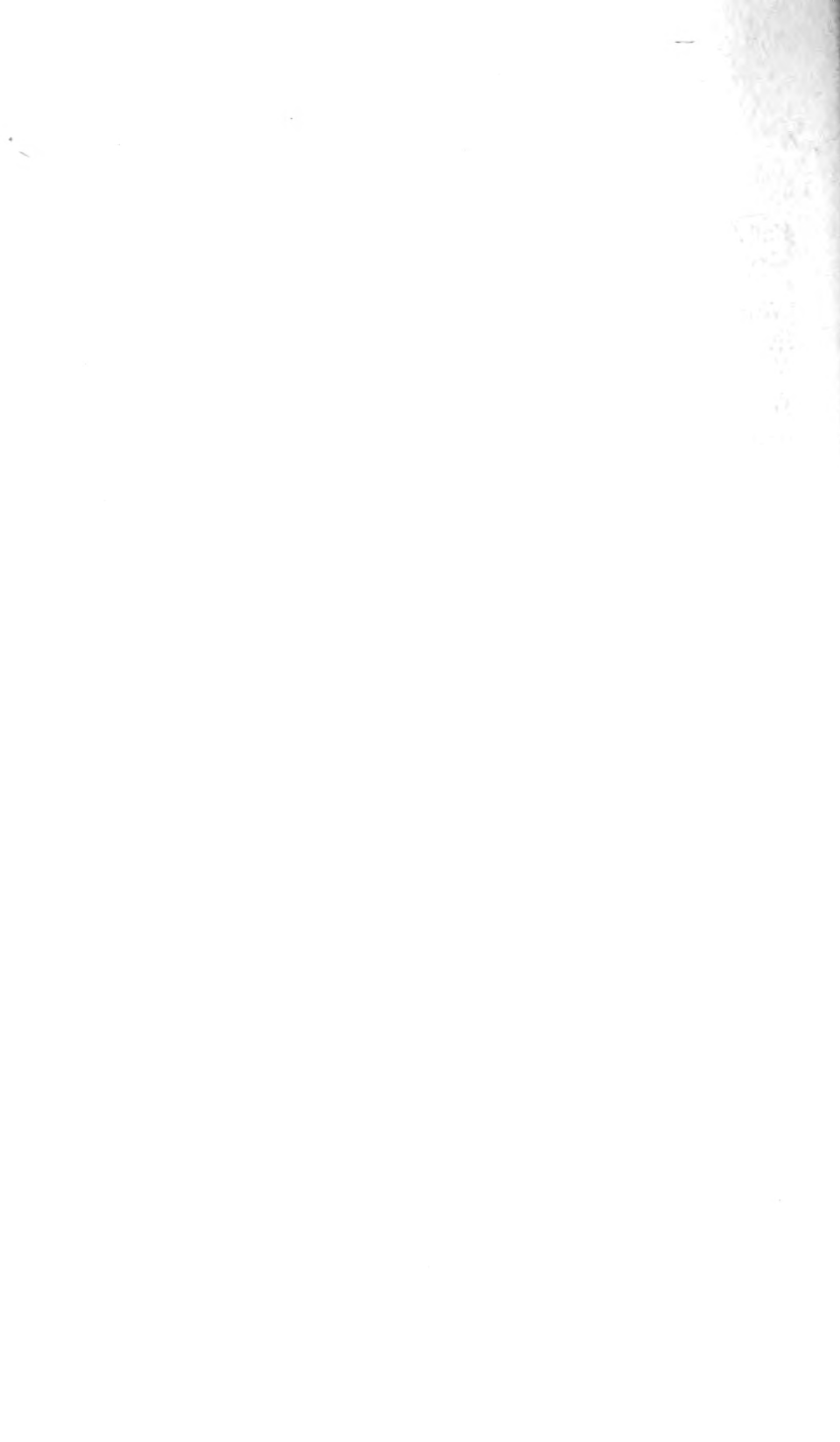
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No. 13047.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,
MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT,
MICHIGAN, and THOMAS B. MACK,

Appellees.

ANSWERING BRIEF OF APPELLEE AND APPELLANT VIVIAN WINGET.

ARGUMENT.

After a brief discussion of the evidence on the points brought out by defendant Standard on its opening brief, this argument will be broken down into the general headings of said defendant's argument in such opening brief.

Discussion of Evidence.

To avoid liability under its policy of insurance in this case, defendant Standard is apparently relying solely upon its third affirmative defense in its answer on file in the action, Paragraph II of which reads as follows:

“Despite said express condition contained in said policy the said Billy Towry failed, neglected, and refused to cooperate with this defendant and failed, neglected, and refused to assist in securing and giving evidence but on the contrary concealed evidence from this defendant and made false and untruthful statements both to this defendant and in a sworn deposition intended for use upon the trial of said actions in the State Court.” [Tr. p. 17.]

The clause in the policy upon which this defense is based is Paragraph 8 of the conditions, the applicable portion of which reads as follows:

“The insured shall cooperate *with the company* and, upon the company’s request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits.” (Emphasis mine.)

In so far as this matter of cooperation is concerned, let us examine the acts of Towry and the circumstances surrounding those acts in chronological order to determine whether Towry complied with his obligation under the terms of said policy.

The first meeting between the assured Towry and the defendant Standard was on January 20, 1949, two days after the accident. At that time, a Mr. Fraser, representing the insurance company, called upon Towry at the hospital where he was confined with injuries from the

accident. At that time and place, Mr. Fraser presented a document [Standard's Ex. D for Identification] to Towry for Towry's signature and Towry signed the same as requested without reading it or having it read to him. The document was prepared by someone other than Towry. [Tr. pp. 123 to 128.] Mr. Fraser was not called as a witness by Standard nor was any excuse offered for failure to call him. In the document so presented by Fraser to Towry there was the statement "I had not been drinking." Nevertheless, Towry cooperated with the company on this first occasion and did as they requested, namely signed a paper presented to him.

Next in chronological order was a meeting between defendant Mack and Mr. Medlen, representative of the insurance company, in April, 1949, at which time Mack advised Medlen that Towry had been drinking a small quantity of beer on the day of the accident. [Tr. p. 176.]

Next was a meeting between Medlen of the insurance company and Towry in July, 1949, at which time Towry signed a document [Standard's Ex. E] which stated all of the facts of the accident and included a statement worded "none of us had any intoxicating liquor to drink." Despite the fact that Medlen knew Towry had been drinking beer as he was informed in April, no question was propounded to Towry regarding the drinking of beer in the July meeting. Towry explained that at the time he signed the July statement he understood that the words "intoxicating liquor" do not include beer. [Tr. pp. 131 and 141.] His understanding in this respect is reasonable in the light of the fact that when 3.2 beer was legalized it was considered non-intoxicating. (See 27 U. S. C. A., Sec. 64a, and *Commonwealth v. Rigo*, 249 Ky.

824, 61 S. W. 2d 900.) Thus, it appears conclusive that Towry cooperated with the company in answering all of their questions as he understood them in the July meeting.

The next meeting between Towry and anyone from the insurance company was at the deposition taken on October 28, 1949, at the offices of James C. Hollingsworth, Ventura, California, attorney for defendant Mack. On that occasion, Mr. Wayne Veatch of Bauder, Gilbert, Thompson, Kelly and Veatch, represented Towry at the instance of the insurance company. Towry was called at the deposition as a witness "on behalf of plaintiffs under the provisions of Section 2055 of the Code of Civil Procedure" and pursuant to a stipulation offered by his then counsel Mr. Veatch "that he have an opportunity to read over and make any corrections (in the deposition) should he choose to do so, and if he does not sign *after a reasonable opportunity has been given* it might be used without signature." [See deposition p. 1, Standard's Ex. C; emphasis ours.] No instructions were given Towry regarding what he was to say or what the nature of a deposition was by his attorney nor by any other attorney in the actual taking of the deposition itself. The deposition was taken with defendant Mack and both his attorneys present, with the plaintiff Winget present and her father, the court reporter, the writer and Towry's then attorney Mr. Veatch. Even though they were related by marriage, there were strained relations between Towry and the plaintiff Winget and her father by reason of the filing of the action against Towry. [Tr. pp. 142 to 145.]

In the taking of the deposition, in answer to questions by Mr. Hollingsworth and the writer, *not by anyone from the insurance company*, Towry denied that he drank beer on the day of the accident. Between March 13 and

20, 1950, when the deposition was first presented to him for correction, he corrected it to read the truth regarding the misstatements of fact [Tr. p. 173], namely, that he had had some beer to drink.

At the time of the taking of his deposition, Towry was still of the understanding that intoxicating liquor did not include beer. He was in the state of mind that if he answered that he had not been drinking beer the chances of having judgment against him would be lessened and he felt that he was cooperating with the insurance company in saying that he had not had any beer. [Tr. pp. 146 and 147.] He had actually drunk only 5 or 6 small bottles of beer between 10:00 or 11:00 in the morning and 5:30 or 6:00 in the evening when the accident occurred and during that period had had a meal at noon and 2 or 3 sandwiches in the afternoon. Obviously, with that amount of beer over that period of time and with that amount of food in a man the size of Mr. Towry, as was apparent to the jury in this case, no cause of action for intoxicated driving could be predicated upon Towry's drinking. If Towry were not cooperating and wanted to defraud the insurance company so as to gain something for his sister-in-law, his easiest method would have been to say that he had drunk a considerable amount of liquor or beer and to continue maintaining such a story was the truth. There is nothing anywhere in the evidence to indicate that he was trying to avoid any criminal prosecution and the only reason expressed anywhere in the evidence for him denying at the deposition that he had drunk beer was his feeling that he would avoid the liability or avoid having the insurance company pay. [Tr. p. 147.] This evinces an attitude of cooperation rather than non-cooperation.

Next in chronological order, Medlen of the insurance company received an indication that there had been drinking on the day of the accident on about November 10, 1949, some 10 or 12 days after the taking of the deposition. [Tr. pp. 118 and 119.] He did nothing until late November or early December, 1949, at which time he contacted Towry and was immediately advised by Towry that he had had some beer to drink and told Towry "we have to keep this quiet, don't go talking to anyone about it." [Tr. pp. 148 and 149, and 179 to 181.] Up until the meeting in late November or early December, no one from the insurance company had told Towry to tell all the truth and all of the facts. During all of the time Towry had been answering any questions they asked truthfully, signed all papers presented, went to all meetings called, took off from work and lost wages doing so, signed answers to complaints and appeared at offices as requested. [Tr. pp. 150 and 151.]

The insurance company did nothing until the following February 28th, even though they definitely knew there had been drinking of beer. On February 28, 1950, Mr. Ellerby of the insurance company met with Towry who took off from work in response to the insurance company request and, carefully following the instructions of Ellerby, answered "true" or "false" to questions propounded by Ellerby from the deposition without giving Towry any opportunity to explain his answers. The deposition had not yet at that time nor until after March 13th been presented to Towry to correct in accordance with the stipulation of his attorney Mr. Veatch that he have an opportunity to read it over and make any corrections should he choose to do so. [Tr. pp. 152 to 155.]

Mr. Towry, following the instructions of Mr. Medlen, said nothing to anyone until he heard that the insurance company attorneys were withdrawing from the case and then he consulted an attorney of his own choosing and was then given an opportunity to make a correction of his deposition which should have been given him long before. This was around the 16th of March, 1950. [Tr. pp. 156 and 157, and 90 to 93.] Showing his state of mind as to why he had denied drinking beer, Towry revealed to this attorney, Mr. Willard, that he wanted to help the insurance company all he could and "he just said no, he hadn't had any intoxicating liquor to drink." [Tr. pp. 99 to 102.]

Next, on March 20, 1951, Mr. Willard, acting for Mr. Towry, informed insurance company attorneys that the changes in the deposition had been made or would be made. [Tr. pp. 93 and 94.]

All of the foregoing evidence was presented to the jury and it shows clearly that not only is there substantial evidence to support the verdict of the jury but the great weight of the evidence shows that Towry cooperated with the insurance company. Certainly his good faith and his good intentions and motives underlying his statements and conduct are upheld by the evidence. Further, it seems certain that the misrepresentations were not of material facts and circumstances in the light of the fact that intoxicated driving could not be proved by the consumption of 5 or 6 small bottles of beer over a period of 7 or 8 hours during which a meal and sandwiches were also consumed by a man the size of whom was within the observation of the jury. See 34 *Journal Criminal Law & Criminology* 202, to the effect that in an average 150-pound man (Towry weighed considerably more) it takes

3 ounces of pure alcohol (200 proof) to cause a blood test of 150 which is designated by the National Safety Council as the point when a driver becomes intoxicated sufficiently to be an unsafe driver. Therefore it would take six drinks (one ounce each) of 100 proof whiskey to cause a blood showing of 150. Standard bottles of eastern beer contain 12 ounces of fluid and of western beer, 11 ounces. Standard alcoholic content of beer is 4% by volume (3.2 by weight). Thus, one bottle of eastern would contain 0.48 ounces of alcohol, and, if Towry had a total of six eastern beers, the maximum blood count he could possibly show would be 144, which is considered by the National Safety Council as sober. The article then goes on to point out that alcohol is eliminated by urination and body absorption over a period of hours and especially where food is consumed, so that the maximum blood count in Towry at the time of the accident would probably be not more than 100 and very likely less than 50.

The immateriality of the representations by Towry regarding drinking is further borne out by offers of evidence refused admission by the trial court. For instance, Plaintiff's Exhibit 1 for Identification, refused admission into evidence [Tr. p. 182], is an instruction presented to the State Court and which bore the handwriting of the trial judge in State Court to the effect that he had refused the instruction because there was no evidence in the case concerning intoxication, the subject of the instruction. Also Winget's Exhibit 5 for Identification, refused admission into evidence [Tr. p. 185], shows the attempt by plaintiff Winget in the State Court to dismiss counts 2 and 3 of the complaint concerning intoxication on the grounds that intoxication was not proved.

Cooperation, or Lack of It, in This Case, Is a Question of Fact, and Appellate Court Is Bound by the Jury's Verdict.

This phase of the argument, corresponding with paragraph numbered I of Standard's opening brief, will be divided into the following subdivisions, namely: (a) distinguishing cases cited by Standard, and (b) law supporting proposition that cooperation is a question of fact and Appellate Court is bound, and (c) prompt withdrawal and/or estoppel.

(a) Distinguishing Cases Cited by Standard.

At the outset, a quotation from *Wright v. Farmers Automobile Inter-Insurance Exchange* (39 Cal. App. 2d 70, 102 P. 2d 352 (May 1940)) is definitely in order. That is one of the cases discussed by Standard at page 14 of its brief. There, the court said at page 81 as follows:

“The fact that circumstances under which the insurer may rightfully claim lack of cooperation and assistance, or the concealing or *misrepresentations of material facts and circumstances* concerning the subject of the insurance in all cases cannot be measured by any legal standard or weighed by any set of legal scales. *In applying the rule, consideration must be given to the facts and circumstances of each case as presented.*” (Emphasis ours.)

In that case the insured gave a statement to the adjuster two days after the accident in which he stated he was driving at 50 miles per hour or a little less, that his guests had not complained about his driving and that the car hit a chuck hole in the road causing it to go out of control. He then gave a second statement to the insur-

ance company attorney to the effect that he was traveling 55 miles per hour and that the guest had mentioned his speed just before the accident. He then gave a third statement to the insurance company attorney that he was driving 55 to 60 miles per hour, that the guest complained of his speed on two occasions, that he did not know what caused the car to go out of control and that "he thought the insurance company should pay (Wright) something because he was injured." At the trial, the assured testified he was driving 60 to 65 miles per hour, that the guest asked him to slow down and that he did not do so and that he was unable to keep the automobile on the paved portion of the road because he "was going too fast" (as against his denial in his answer that the accident had occurred because of his speed and his previous statement that the car turned over when he hit a chuck hole in the road which he had not seen).

Two members of the Appellate Court by majority opinion held that the foregoing facts constituted a misrepresentation of material facts and failure to cooperate as a matter of law. There was no conflict whatsoever in the evidence as to the making of the four different statements or as to the motive or intent for making such conflicting statements. On the contrary, the evidence definitely showed an intent to defraud the insurance company so that the guest could get damages. Clearly the case is one of non-cooperation in the light of the repeated false statements upon obviously material facts.

The case of *Valladao v. Firemans Fund Indem. Co.* (13 Cal. 2d 322, 89 P. 2d 643 (April, 1939)) is likewise easily distinguishable from the instant case. In that case the assured had pleaded guilty to and been fined for two reckless driving charges prior to the accident in question.

The assured was the driver but fled the scene of the accident and represented that another party had been driving, and that the assured had not even been in the truck at the time of the accident. A day or two later the assured again made the same false statements to the insurance company. When action was filed against him the assured again made the same false representations to the insurance company attorney. Later the same day he visited the scene of the accident with the attorney and related the same falsifications in detail. On a fifth occasion the assured verified answers based upon the misrepresentations. A month or two later he called upon the insurance company attorney and again related in detail the same misstatements.

Obviously in that case there was a repeated and prolonged failure on the part of the assured to cooperate with the insurance company and tell the truth with intent to defraud the insurance company and protect himself against criminal prosecution. The court pointed out that the assured had knowingly, wilfully and repeatedly misrepresented the identity of the person driving the truck at the time of the accident, a fact unquestionably material to the insurer.

The court then stated at page 330 as follows:

“It is generally established, and we shall not pause to refer to the authorities, that what constitutes cooperation (or the lack of it) on the part of the assured, within the meaning and effect of a cooperation clause, is ordinarily a question of fact. This is so because a dispute normally exists as to the actual statements and conduct of the assured in the premises *or because of the existence of an uncertainty as to the intent or motive underlying his statements or conduct.*” (Emphasis ours.)

In that case, there was no dispute whatsoever concerning the falsification or the intent or motive underlying the falsifications. In our case, on the contrary, there is a definite issue as to the intent or motive and good faith of the assured in making the statements he did. It is submitted that the preponderance of the evidence and at least the substantial evidence is to the effect that Towry's only motive and intent in making his misrepresentations at the time of the deposition (admittedly false) was to protect the insurance company and to, in good faith, cooperate with it. As to statements made previous to the deposition by Towry which Standard claims were false, a dispute exists as to the actual falsehood of such statements, Towry explaining that he did not imbibe in intoxicating liquor as he understood the meaning of those words. The jury resolved this conflict in his favor.

There is also the further distinction of the case at bar on the grounds that there was a conflict as to the materiality of the misrepresentations by Towry.

Thus, when we analyze the *Valladao* case, we find that it is authority for the position of the plaintiff Winget rather than for the defendant Standard.

The case of *Margellini v. Pacific Automobile Ins. Co.* (33 Cal. App. 2d 93, 91 P. 2d 136 (May, 1939)) involved a cooperation clause which provided that the insured should give immediate written notice of any accident with the fullest information obtainable, including names and addresses of witnesses, forward any notice of suits and aid in effecting settlements, in obtaining evidence and witnesses and to fully cooperate with the company at all times. There, the insured's wife was in an accident, failed to report to the insurance company, disappeared

without any forwarding address, and concealed herself despite repeated and prolonged efforts to locate her, even by her own attorney. The insurance company obtained offers of settlement well under the judgment subsequently obtained. The assured reported to the company and advised he would get the information concerning the accident as soon as he located his wife. He failed to contact them again at all. He and his wife were served with summons and complaint almost a year after the accident and waited three months before sending same to the insurance company which then returned the papers refusing to defend. Obviously there was failure to comply with the clause in the policy requiring that they give "immediate" notice, etc. No false statements were involved at all. Certainly the insurance company could not be required to defend when it had no information concerning the accident furnished to it by the assured.

In *Home Indemnity Co. of New York v. Standard Accident Insurance Company of Detroit* (167 F. 2d 919, C. C. A. 9th (May, 11, 1948)), cited by Standard, the assured did the following things: First, he stated to the company that he had not been in an accident, had not struck anyone, knew nothing about the accident and his car was damaged at the race track. Second, he gave sworn statements to the company therein repeatedly denying he had been in an accident, by 7 unqualified denials and 3 modified denials. Third, he later informed the company he had fallen asleep and the accident may have happened then. Fourth, he told the company he was going to plead guilty to a charge of failing to stop and render assistance (480 Cal. Veh. Code) and "can't tell you why" (it appeared that the assured by entering such a plea escaped prosecution for manslaughter). Fifth, the

insurance company objected to the assured's attorney in the criminal matter that the guilty plea should not be entered but this was to no avail. Sixth, the assured pleaded guilty. Seventh, the assured signed answers admitting he was involved in the accident after the insurance company had prepared for him answers denying he was in it. In that case, it appears clear that the assured was trying to defraud the insurance company with the intent of saving himself from a manslaughter prosecution.

There was no serious dispute in the evidence as to the accuracy of the seven acts and representations above described. The Appellate Court pointed out that in setting aside the trial court's findings as "clearly erroneous," "the first two of these findings are inferences from undisputed testimony or documentary evidence, from which we are in as good a position to draw deductions as was the court below." There was no question as to the falsity of the statements nor as to the intent or motive of the insured in making them in that case. The case is clearly distinguished from the present one where those questions exist.

In the case of *Salonen v. Paanen* (71 N. E. 2d 227 (Mass., 1947)) the assured gave a statement to the adjuster for the company shortly after the accident in which she stated that she noticed a Ford traveling in the opposite direction but she did not remember much after that; that she moved over a little closer to her right side of the road and that her auto must have gone off the road and struck a tree on the right side and that she was unable to say whether or not the Ford had crowded her off the road. She also stated that the guest in the car did not object to the manner of the speed of her auto on this occasion.

At the trial, she testified repudiating material portions of this first statement and elaborated a substantially different version of the accident, which in substance was that she was traveling at 40 to 45 miles per hour, her automobile swerved from one side of the road to the other several times, the guest objected to the manner in which she was driving, that she, without slackening her speed, looked around to comment about some milk that the guest had spilled and while doing this the automobile went off the road. She also testified that she did not see the old Ford referred to in the first statement. She admitted that she desired to see her sister, the guest, compensated for her injuries. Clearly she disclosed an intent to defraud the insurance company for the benefit of her sister and obviously the only holding of the court in such a situation would be that the intentional furnishing of such false information of a material nature would be a breach of the cooperation clause.

In all of the foregoing cases cited by defendant Standard, a definite intent to defraud the insurance company existed, there was no conflict regarding the nature of the acts or false statements or of the motive or intent underlying the making of them and the materiality of each misstatement or failure to act stuck out like a sore thumb. On the other hand, in the case at bar, there is no evidence whatsoever of any intent to defraud the insurance company, the evidence at least substantially shows that the assured's intent and motive was to cooperate with the insurance company and it seems entirely without merit to contend that the drinking of 5 or 6 small bottles of beer over a period of 7 or 8 hours is material in any way to the defense of a wilful misconduct case. Obviously the man was not intoxicated and if he was not intoxicated he

must be deemed to have been sober. His acts of wilful misconduct are entirely separate and distinct from any intoxication or lack of intoxication. At least there was a conflict in the evidence as to the materiality of the representations, which conflict was resolved in favor of plaintiff Winget.

(b) Law Supporting Propositions That Cooperation Is a Question of Fact and Appellate Court is Bound.

The case of *Shaw v. Imperial Mutual L & B Assn.* (4 Cal. App. 2d 534 at 537) states as follows:

“The rule is well established that an untrue statement, in order to avoid an insurance policy, must have been knowingly and intentionally made *with the intention of defrauding the insurer; and whether a false statement was so made is a question of fact for the jury or trial court.*” (Emphasis ours.)

See also,

Pedrotti v. American National Fire Ins. Co. (90 Cal. App. 668), and

Miller v. Firemans Fund Ins. Co. (6 Cal. App. 395).

In *Porter v. Employers, etc., Corp.* (40 Cal. App. 2d 502) the court said at pages 510 and 511 as follows:

“What constitutes cooperation, or lack of it, on the part of the assured within the meaning of such clauses, is a question of fact, except where there is no dispute in the evidence. (*Valladao v. Firemans Fund Indem. Co., supra*). Where, however, there is a conflict as to what was said by the insured, that conflict, like other conflicts, is determined by the findings of the lower court.”

In that case there was a substantial discrepancy between statements made by the assured shortly after the accident while she was in the hospital, as written down by the insurance adjuster and signed by the assured, and the testimony of the assured at the trial. The court held that there was no evidence that the insured wilfully made any false statements, or that she did not act in good faith or that she did not make a full, fair and complete disclosure in any material respect to the insurance company. Likewise, in the case at bar, there is evidence of good faith and certainly there is no evidence that the assured made any statements *to the insurance company* which were false. It is true that he made false statements to attorneys for the plaintiffs in the case but not to the insurance company in violation of his obligation under the policy. Nor is there any intent in the instant case to defraud the insurance company.

In the case of *Pacific Indem. Co. v. McDonald* ((9th Cir.) 107 F. 2d 446, 131 A. L. R. 208) the assured made false statements to the company and then about a week later corrected the statements truly stating the facts concerning the accident. The case involved intoxication and gross negligence on the part of the assured in injuring his guest. The insurance company brought a declaratory relief action to determine whether they were required under the policy to defend, claiming non-cooperation by giving of the false statements. The court held that it was a matter for the jury as to whether the assured had cooperated with the company.

In *Norton v. Central Surety & Ins. Co.*, 9 Cal. App. 2d 598 (1935)) the injured guest obtained a judgment and sought recovery against the insurance company which defended on the basis of non-cooperation by its assured.

The jury found against the defense of non-cooperation, and the court held that the issue of lack of cooperation on the part of the assured sufficient to constitute a breach of the policy, was one of fact and that the burden of proving this affirmative defense is obviously on the insurer. The court stated that the implied accurate findings of the jury on the question of cooperation as well as by the trial court in ruling on motions is conclusive on the appeal unless it can be held as a matter of law that the evidence in the case is without substantial conflict and the only reasonable inference to be drawn therefrom is contrary to said findings. The power of the reviewing court begins and ends with the inquiry as to whether there is any substantial evidence in the case to sustain the findings or, if the evidence be conflicting, whether the facts and circumstances are such that reasonable minds might draw different inferences therefrom and if these inquiries be answered in the affirmative, the findings must be sustained. Moreover, in determining these questions, all inferences reasonably deducible from the evidence favorable to the prevailing party must be indulged in by the reviewing court.

In the case of *Mercer Casualty Co. v. Lewis* (41 Cal. App. 2d 918) the insurance company attempted to avoid liability on a policy on the basis that the representations on the application for the policy were fraudulent. However, the evidence showed that the application was filled out by agents of the insurance company. The court held that obviously there can be no misrepresentation where there was no representation and there can be no breach of warranty without warranty. In the instant case, there was no representation to the insurance company that was false but only to attorneys for opposing parties who had

called the assured as their witness. The clause upon which Standard relies states that the insured "shall cooperate *with the company*" and says nothing about his cooperation with anyone else.

In the *Mercer* case, the court held that there was no failure to cooperate with the insurance company in response to any demand made by them of such, and that the question of cooperation was a matter of fact and that the finding of the trial court upon substantial evidence supporting it is conclusive.

See also *Panhans v. Associated Indem. Corp.* (8 Cal. App. 2d 532) where the court held that lack of cooperation on the part of the insured sufficient to constitute a breach of policy is one of fact and that the Appellate Court would not disturb the finding of the jury that the acts of the insured did not constitute a material breach of the cooperation clause.

In *Wormington v. Associated Indem. Corp.* (13 Cal. App. 2d 321), hearing in the Supreme Court denied, the court held that a representation even though untrue, does not affect the validity of a policy of insurance unless it is material. In that case, the insured did not appear at the trial but he did report the accident within 48 hours after it occurred and gave his deposition. At the time the assured's deposition was taken the insurance company counsel was present with full opportunity to examine the assured. The court stated that in its opinion the finding of the trial court that the assured fully cooperated with the defendant insurance company in the preparation of the defense of said action was conclusive because of the substantiality of evidence to sustain the decision arrived at by the trial court upon this issue.

Rule 61, 28 U. S. C. A. (Fed. Rules Civil Procedure) provides as follows:

“No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”

Thus, in the instant case, submission of the issue of cooperation to the jury in the lower court to determine whether Towry cooperated on a material matter and to determine his motives and intent and good faith is not error and no proof of substantial injustice can be shown. The jury must necessarily have determined the misrepresentations were not material and that the assured's motives and intent were in good faith.

In *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.* (178 F. 2d 541 (9th Cir.)) the court holds that the trial court's interpretation is not binding on appeal but the reviewing court will attach weight to the trial court's interpretation and will follow it if it is reasonable and will not substitute another interpretation although it seems equally tenable and a court of appeals may draw its own inferences from undisputed facts or purely documentary evidence. The court there held that a finding is “clearly erroneous” when, although there is evidence to support it, the reviewing court on the entire evidence is left with the *definite and firm conviction* that

a mistake has been committed. Under the rule that findings may not be set aside unless they are clearly erroneous, the findings of the trial judge will not be disturbed if supported by substantial evidence after giving full effect to the opportunity which the trial judge had to observe the witnesses, judge their credibility and draw inferences from contradictions of the testimony of even the same witness.

Thus, in the *Home Indemnity Co.* case (*supra*) cited by Standard, the court pointed out that judicial review of findings of the trial court does not have the statutory or constitutional limitations of findings by administrative agencies or by a *jury* and that the Appellate Court may reverse findings of fact by the trial court where clearly erroneous. However, under Rule 61 (*supra*), the Appellate Court could not reverse findings of a jury unless it appears to be inconsistent with substantial justice.

In *Bernadich v. Bernadich* ((Mich.) 283 N. W. 5), the plaintiff was injured in an accident in the vehicle driven by her cousin. The cousin ran off the pavement into a culvert and the automobile was overturned. The cousin (assured) advised the insurance company a few days after the accident that it was due to the negligence of the operator of another vehicle coming toward him. Approximately four months after the accident the assured gave the insurance company a similar false statement. Approximately 18 months later he again repeated the statement and then shortly thereafter when the case was about to be called for trial the assured advised the company the truth that there was no oncoming car. The question was submitted to the jury which found that the defendant did not attempt to perpetrate a fraud on the insurance company. The Appellate Court held there was

no proof of failure to comply with the provisions of the policy requiring the insured to cooperate and assist and quoted with approval language from the case of *Rockmiss v. New Jersey Manufacturers Assn. Ins. Co.*, 112 N. J. L. 136, 169 Atl. 663) to the effect that the version of the insured of the occurrence contained in the first statement tended to relieve him from negligence, and it cannot be said that this denotes a failure to cooperate and assist the insurer in making a defense or a purpose to perpetrate a fraud. Rather the reverse is the case. *The insured thereby evinced a willingness and purpose to cooperate with and assist the insurer in resisting the claims for damages asserted by the plaintiff.*

From all of the foregoing it is apparent that in all cases cited by defendant Standard, the assured had a motive to deceive other than that of cooperation, such as keeping out of jail, preventing second arrest, losing a driver's license, helping a relative to recover damages, etc. In the instant case there is no evidence at all to support any such motive on the part of Towry. On the contrary, the evidence shows by the great weight thereof that Towry intended to help the insurance company in making his false statements.

In the light of these facts and the law set forth by plaintiff Winget above, it is clear that the question of cooperation is one of fact which has been determined in Winget's favor by the jury and which should not be disturbed upon appeal.

(c) Prompt Withdrawal and/or Estoppel.

It seems needless to pursue this argument further, however, there are two additional theories upon which the Appellate Court may find in favor of Winget. First of all, prompt withdrawal of a false statement without a showing of prejudice cures the falsification.

It is to be noted that approximately 30 days after he gave his false statement at the deposition and at the first opportunity, Towry advised the insurance adjuster of the truth regarding his drinking. In that 30-day period nothing took place which could in any way prejudice the insurance company. The case of *Pacific Indem. Co. v. McDonald* ((9th Cir.) 107 F. 2d 446, 131 A. L. R. 208) holds that the prompt withdrawal of a falsehood cured the default of an assured who made the same in the absence of some showing that the company was prejudiced by the delay in the telling of the truth.

There is also the question of whether the insurance company was estopped to deny its liability. It is to be noted that as early as April, 1949, the defendant Mack advised Medlen of the insurance company that Towry had been drinking beer. [Tr. p. 176.] He made no inquiry of Towry regarding the drinking of beer until late November or early December. About November 10, 1949, Medlen again received information to the effect that Towry had been drinking beer. He finally called upon Towry in late November or December and obtained the truth. At the time Medlen obtained this information he advised Towry to keep it quiet and Towry, following his instructions, did so. Nothing further was done until February 28, 1950, at which time Mr. Ellerby of the insurance company questioned Towry without giving him opportunity to explain his answers. Trial of the case

was set for March 27, 1950, but the insurance company did nothing until March 13th at which time they wrote a letter and misdirected it to Towry advising that they were disclaiming liability. They then attempted to withdraw from the case on the very eve of the trial. In the light of this continued participation on the part of the insurance company in the defense of Towry, for almost a year, with knowledge of the fact that he had been drinking beer and then to suddenly attempt withdrawal from the case at a time when the preparation of a defense by other counsel was considerably hampered by the shortness of time before trial, appears to the writer to be lulling the assured into a sense of security and amounting to an estoppel to deny liability.

The Court Did Not Commit Error in Permitting Towry to Explain Changes in His Deposition.

Defendant Standard at page 17 of its brief claims that it was error for the trial court to admit the explanation by Towry to his personal attorney of the facts surrounding the giving of his deposition and of his state of mind at that time. Mr. Willard, the personal attorney, was called as a witness for defendant Standard and upon direct examination was asked whether he had discussed the taking of the deposition with Towry and concerning the conversation that was had between Willard and Towry. [Tr. pp. 90 to 93.] In other words, defendant Standard opened it up on direct examination and on cross-examination plaintiff Winget was entitled to go into the details of that conversation.

This evidence was admissible on another ground also, namely, to prove the state of mind, intent or motive of Towry at the time of the giving of his deposition. (See

Sprague v. Walton (145 Cal. 234) holding that there is no better proof of intention than declared intention. See also *Dinneen v. Younger* ((1943) 57 Cal. App. 2d 200), *Hansen v. Bear Film Co.* ((1946) 28 Cal. 2d 154) and *Whitlow v. Durst* ((1942) 20 Cal. 2d 523), all holding that when intent is a material element of a disputed fact, declarations made after as well as before and at the time of the act that indicate the intent with which the actor performed the act are admissible in evidence as an exception to the hearsay rule, irrespective of whether the declarations are self-serving. See also, *Katz v. Enos* ((1945) 68 Cal. App. 2d 266) holding that the declarations of a decedent to his attorney as to the intent with which he executed a deed are competent on the issue of such intent.

The Court Did Not Commit Error in Excluding Standard's Exhibit D.

The objection of Winget to the offer of Exhibit D on the grounds that there was no proper foundation laid was sustained by the trial court. [Tr. p. 124.] The ruling was proper. Towry testified that he had not read the statements nor had it read to him and did not know what it contained and that he merely followed the instructions of the insurance adjuster and signed the statement. It might properly be contended that the statement would be binding upon Towry if it were in the hands of an innocent party to the transaction but where the statement, as in this case, was prepared by the insurance adjuster and signed by Towry without him knowing what it contained, obviously there is insufficient foundation upon which to allow the introduction of the statement into evidence so as to bind Towry.

Standard offered to prove by the witness Towry that Towry gave a report to a representative of the Highway Patrol in which he stated that he had not been drinking. This offer was made after Towry had testified as follows: "I don't recall what I told the Highway Patrol that night." [Tr. p. 168.] The meeting that night with the Highway Patrol was the only meeting with the patrol that Towry had or testified to. In the light of such testimony, the court properly refused the offer of proof.

If the defendant Standard had wished to get the statement into evidence, it would seem that it should have brought the adjuster Fraser to testify regarding the statement as well as the member of the Highway Patrol who did the questioning. No excuse for its failure to bring either of these witnesses was offered by defendant Standard and in the light of such failure, defendant Standard would seem to have waived its right to establish a proper foundation for the admission of Exhibit D.

The only thing authentic about the document established by the evidence was the signature of Towry to which he testified. The situation is much like that in the case of books of account which must be established by independent proof as to their correctness before they are admissible in evidence. See *Kerns v. Dean* (77 Cal. 555).

In the case of *Woodman v. Pacific Indem. Co.* (33 Cal. App. 2d 321 at 329) the court points out as follows:

"Section 4½ of Article VI of the Constitution prohibits us from reversing a judgment 'on the ground . . . of improper admission or rejection of evi-

dence . . . unless . . . the court shall be of opinion that the error complained of has resulted in a miscarriage of justice.' . . . We are therefore precluded by the Constitution from reversing the judgment on that ground."

Rule 61, 28 U. S. C. A. (Fed. Rules of Civil Proc.) would likewise apply as does *Hughes v. Pacific Wharf and Storage Co.* (188 Cal. 210). In that case the exclusion of a letter written by the defendant corporation to the plaintiff, offered for the purpose of showing the contemporaneous construction of the contract by the parties, could not have resulted in a miscarriage of justice where other evidence of greater weight upon the same subject and to the same effect as the letter in question was received in evidence.

At this point, a quotation from *Porter v. Employers, etc., Corp.* (40 Cal. App. 2d 502 at 513) is pertinent. There the court stated as follows:

"Certainly, it cannot be urged seriously that Mrs. Adamson is responsible for the carelessness of the adjusters in failing to record her statements properly. Nor can it be contended that by signing statements without reading them, in which statement the adjusters carelessly or by design misrepresented what had been told them, that the insured was guilty of lack of cooperation as a matter of law. She was not dealing with these adjusters at arm's length. As agents of her insurance company she was entitled to believe that they would prepare a proper and correct memorandum of her statements."

When Mr. Fraser of the insurance company gave Towry the statement in the hospital at a time when he was suffering from his injuries in the accident, and requested Towry to sign and Towry complied, he thereby cooperated with the insurance company in signing a false statement. The insurance company made the false statement for him to sign. Can they now claim the benefit of their own wrongful act? Isn't that getting out of their policy through their own violation of duty to be truthful? Can the insurance company on the one hand demand the insured be truthful to them and on the other hand insist he sign false statements (prepared by them, whether mistakenly or not), and take advantage of such false statement at a later date?

In addition, the good faith of the insurance company in the case is further in doubt, when we consider the fact that Mr. Ellerby insisted Towry accompany him for the purpose of taking a sworn statement on February 28, 1950, in which Towry was denied the privilege and right of explaining his answers. After having instructed assured to remain silent concerning his false statements, and without giving him the opportunity to read over and make corrections of his deposition in accordance with the suggestion and stipulation of their own attorney and in accordance with the right to correct the deposition given him by statute (*Section 2206, C. C. P.*), the insurance company surreptitiously did everything to avoid its liability.

The evidence appears to the writer to indicate from the very beginning an evil design on the part of the insurance company to get out from under a binding contract upon the flimsiest excuses imaginable. Are we to deny Towry the protection for which he paid a valuable con-

sideration on the evidence produced in this case? How can insurance agents expect to continue the sale of policies if precedent is to be established such as this sought by defendant Standard? The door would be opened for the commission of fraud by insurance companies inducing poor assureds not to cooperate to the loss of badly injured plaintiffs and the advantage of insurance companies.

Conclusion.

The preponderance, or at least the substantial evidence supports the verdict of the jury. The issues are questions of fact for the determination by a jury and the Appellate Court, in the interests of substantial justice, is bound by that verdict.

Respectfully submitted,

NEIL D. HEILY,

Attorney for Appellant and Appellee Vivian Winget.

No. 13049

United States
Court of Appeals
For the Ninth Circuit.

GLENN O. PRICKETT, et al.,

Appellants,

vs.

CONSOLIDATED STEEL CORPORATION, a
Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

UCL 23 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

MOHR and BORSTEIN,
PERRY BERTRAM,

412 W. 6th St.,
Los Angeles 14, Calif.

For Appellee:

ALFRED WRIGHT,
HAROLD F. COLLINS,

621 S. Spring St.,
Los Angeles 14, Calif. [1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil No. 6274-PH

GLENN O. PRICKETT, H. F. WINANS and S.
E. WHITNEY, on behalf of themselves and
other employees similarly situated,
Plaintiffs,

vs.

CONSOLIDATED STEEL CORPORATION,
LTD., a corporation,
Defendant.

COMPLAINT FOR WAGES AND LIQUI-
DATED DAMAGES DUE UNDER THE
FAIR LABOR STANDARDS ACT OF 1938

By way of complaint, plaintiffs complain and
allege, as follows:

I.

Plaintiffs bring this action on behalf of them-
selves and all other employees similarly situated,
pursuant to Sec. 16 (b) of the Fair Labor Stand-
ards Act of 1938 (Public No. 718, 75th Cong., CH.
676, 52 Stat. 1060-1069 (1938), 29 U.S.C. Sec. 201-
219), hereinafter referred to as the Act to recover
overtime wages, liquidated damages and attorneys'
fees.

II.

Jurisdiction of this action is conferred upon the
Court by [2] Sec. 16 (b) of the Act and by Sec. 24
(8) of the Judicial Code (28 U.S.C. Sec. 41 (8)).

III.

Defendant is a corporation organized under the laws of the State of California, authorized to do business therein and having its principal place of business in the County of Los Angeles, state of California, within the jurisdiction of this Court.

IV.

At all times herein mentioned, defendant was engaged at its said place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court, in interstate commerce and in the production of goods, to-wit, ships, for interstate commerce within the meaning of the Act.

V.

Within three years last past, defendant employed the plaintiffs and the other employees similarly situated, on behalf of whom this action is brought, at its said place of business, as maintenance electricians, marine electricians, stationary engineers, operating engineers, mechanical maintenance employees, toolroom attendants, toolroom mechanics, warehousemen, issue and receiving clerks, and in various other crafts and capacities.

VI.

During the respective periods of employment by the defendant, as aforesaid, plaintiffs and said other employees similarly situated, were compensated at various hourly rates, the precise period of employment and hourly rates at which plaintiffs and each such employees were employed are contained in the

books and records of the defendant, and are not known to the plaintiffs at the present time. In substantially all of the weeks in which plaintiffs and other employees similarly situated were employed, they were credited with having worked forty-eight (48) hours or more, for forty (40) hours of which they were paid at straight time, and for [3] all hours in excess of forty (40) hours, they were paid at the rate of time and one-half. In addition to said forty-eight (48) hours or more for which they were credited and paid, the plaintiffs and said other employees similarly situated worked one-half ($\frac{1}{2}$) hour each day, or three (3) hours or more each week, for which they were not credited and for which they received no compensation whatsoever.

VII.

There is now due, owing and unpaid, from the defendant to the plaintiffs, and to each of the employees similarly situated, on behalf of whom this action is brought, a sum equal to one and one-half times the regular rate at which each such employee was employed, and for which he was compensated, times three (3) or more hours for each week of his employment by the defendant, and for which he was not paid, plus an equal amount as liquidated damages.

VIII.

Section 16 (b) of the Act provides that the Court in this action shall, in addition to any judgment

awarded to plaintiffs, allow a reasonable attorneys' fee to be paid, by the defendant.

Wherefore, plaintiffs pray judgment against the defendant and in favor of the plaintiffs and each of the employees similarly situated, on behalf of whom this action is brought, in a sum equal to one and one-half times the regular rate at which each such employee was employed, times three (3) or more hours for which he was not paid in each week of his employment by the defendant, plus an equal amount as liquidated damages, plus attorneys' fees for services rendered herein, and for costs of suit and all proper relief.

MOHR AND BORSTEIN,

By /s/ ALFRED J. BORSTEIN,
Attorneys for Plaintiffs.

[Stamped]: Complaint amended: 1st date: April 6, 1949.

[Endorsed]: Filed Jan. 16, 1947. [4]

[Title of District Court and Cause.]

NOTICE OF MOTIONS: TO DISMISS ACTION
TO STRIKE MATTER FOR MORE DEFINITE
STATEMENT AND BILL OF PARTICULARS

To the Plaintiffs Herein and to Their Attorneys,
Mohr and Borstein:

Please Take Notice that on Monday, May 12, 1947,

at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard in Court Room No. 3, of United States District Judge Peirson M. Hall, located in the United States Post Office and Court House at Los Angeles, California, the defendant, Consolidated Steel Corporation, by and through its attorneys, will present motions for orders and relief as follows:

I.

To dismiss the pending action in its entirety.

Said motion will be urged upon the ground that the Complaint herein fails to state any claim upon which relief can be granted against the defendant.

II.

To dismiss the pending action as to all unnamed and [5] unidentified claimants in whose behalf plaintiffs assert the right to bring and maintain said action, which claimants are indeminately referred to in the Complaint herein (Paragraphs I, V, VI and VII) as "other employees similarly situated," unless each of said claimants shall intervene or otherwise become a party of record in said action, or shall designate an agent or representative to maintain said action in his behalf within a reasonable period of time to be fixed by the court herein.

Said motion will be urged upon the ground that unnamed and unidentified claimants have no status as parties to said action, and upon the further ground that plaintiffs have no right to bring or

maintain said action in behalf of unnamed and unidentified claimants.

III.

To strike matters stated and alleged in the Complaint as follows:

1. The words "and all other employees similarly situated," in Paragraph I, page 1, lines 25 and 26.

2. The words "and all other employees similarly situated," in Paragraph V, page 2 line 16.

3. The words "and all other employees similarly situated," in Paragraph VI, page 2, lines 24, 25 and 30; page 3, lines 3 and 4.

4. The words "and each such employees," in Paragraph VI, page 2, lines 26 and 27.

5. The words "and to each of the employees similarly situated," in Paragraph VII, page 3, line 10.

6. The words "and each of the employees similarly [6] situated," in the Prayer, page 3, lines 22 and 23.

IV.

To require plaintiffs to furnish more definite statements and a bill of particulars respecting matters, severally, as follows:

1. As to each plaintiff and claimant, a statement describing the exact nature of the work, labor or other services performed.

2. A detailed statement relative to the "one-half (1½) hour each day, or three (3) hours or more each week" worked by the several claimants "for which

they were not credited and for which they received no compensation whatsoever” as alleged in Paragraph VI of the Complaint, which statement shall specify:

(a) The exact nature of work performed by each claimant during said one-half ($\frac{1}{2}$) hour period each day.

(b) Whether the alleged work was performed prior to the commencement of or subsequent to the termination of the regularly established shift or hours of employment of each claimant or preceding, during or subsequent to any lunch, rest or recreational period or otherwise.

(c) Whether the one-half ($\frac{1}{2}$) hour period each day for which compensation is claimed, includes any effort expended or interval of time devoted to travel to or from or within defendant's plant or place of business; and if so, the [7] number of minutes expended in each such act of travel.

(d) Whether the defendant ordered, instructed, notified or in any other manner required or directed claimants or any of them to expend, devote or apply said one-half ($\frac{1}{2}$) hour each day to specified duties, services, occupations, assignments or efforts; and if so, the time, place, and manner of performance thereof, and if so, the name and official position of the employee, representative or officer of defendant who initiated or enforced such requirement.

3. A detailed statement as to all claimants referred to in the Complaint (Paragraph I, page 1) as

“all other employees similarly situated,” showing with respect to each such claimant:

- (a) claimant's name;
- (b) job classification;
- (c) nature of duties performed;
- (d) period of employment by defendant; and
- (e) the date, form, and nature of every authorization under which any of the plaintiffs assert the right to represent each such claimant in the pending action.

Said motion will be urged upon the ground that defendant requires the designated [8] information in order to prepare its defense herein.

The foregoing motions will be based upon the pleadings and records herein, and defendant will rely upon the Memorandum of Points and Authorities filed herewith.

Dated: April 11, 1947.

ALFRED WRIGHT and

HAROLD F. COLLINS,

By /s/ HAROLD F. COLLINS,

Attorneys for Defendant

Consolidated Steel Corporation.

[Endorsed]: Filed April 11, 1947. [9]

At a stated term, to wit: The February Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 12th day of May in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable: Peirson M. Hall,
District Judge.

[Title of Cause.]

No. 6274-PH Civil
GLEN O. PRICKETT, et al.,

Plaintiffs,

vs.

CONSOLIDATED STEEP CORP., LTD.,

Defendant.

This cause coming on for hearing on motion of the defendants to dismiss, to strike, for more definite statement, or for a Bill of Particulars, pursuant to notice thereof filed April 11, 1947; Messrs Mohr and Borstein by Alfred J. Borstein, Esq., appearing as counsel for the plaintiffs; Harold Collins, Esq., appearing as counsel for the defendant; counsel for plaintiff states he is willing to grant a Bill of Particulars, whereup motion for Bill of Particulars is granted and all other motions are stricken from the calendar. [16]

[Title of District Court and Cause.]

BILL OF PARTICULARS

To the Defendant, Consolidated Steel Corporation,
Ltd., and to Their Attorney:

The following is the Bill of Particulars demanded
by you:

The names of the plaintiffs and the other claim-
ants similarly situated to them, together with job
classification of each of them, and their approximate
dates of employment at the Consolidated Steel Cor-
poration, Ltd., are:

Name	Job Classification	Approx. Dates of Employment
Glen O. Prickett:	Maintenance Electrician	
(Sub Station Operator)	.....	May 5, 1943, to November 29, 1946
H. F. Winans:	Maintenance Electrician	
(Sub Station Operator)	.....	March 23, 1942, to May 3, 1946
S. E. Whitney:	Maintenance Electrician	
(Sub Station Operator)	.....	January 19, 1945, to June 30, 1946
Harry O. Sortors:	Maintenance Electrician (Lead- man of Sub-Stations) Operating Engineer, Sta- tionary Engineer	.....
		June 30, 1941, to January 14, 1946
Luther M. Walters:	Stationary Engineer (Butane, Oxygen and Acetylene Plants)	.....
		November 22, 1943, to August, 1946
Samuel D. Tinker:	Stationary Engineer (Acety- lene, Oxygen, Propane Plants) and Compressor	
House Operator	.....	December 6, 1942, to November, 1945
Frank Hemminger:	Maintenance Electrician (Sub- Station Operator)	.....
		June 1, 1941, to June 25, 1946
Oliver H. Raftery:	Maintenance Electrician (Sub- Station Operator)	.....
		June 16, 1942, to April, 1946
Fred M. Koehler:	Maintenance Electrician (Sub- Station Operator)	.....
		March 6, 1942, to March 4, 1946
Charles R. Cobb:	Maintenance Electrician	
(Sub-Station Operator) (Leadman Sub- Stations)	.....	January 15, 1942, to July 25, 1946
Charles E. Smith-Sanford:	Maintenance	
Electrician (Sub-Station Operator)	.....	July, 1941, to August, 1945

The one-half ($\frac{1}{2}$) hour each day that each and every person above named worked, as alleged in the complaint, occurred during his respective lunch periods, during which time he could not leave his post or station, but was required to perform work and services during said period of time the same as during the other periods of his shift. [18]

The nature of the work performed and the duties of each claimant are as follows:

*Name**Duties*

Glen C. Prickett—Operated Sub-Station at all times during his shift, including the lunch period.

Worked $8\frac{1}{2}$ hours per day, and was paid for 8 hours.

H. F. Winans—Operated Sub-Station at all times during his shift, including the lunch period.

Worked $8\frac{1}{2}$ hours per day, and was paid for 8 hours.

S. E. Whitney—Operated a Sub-Station at all times during his shift, including the lunch period.

Worked $8\frac{1}{2}$ hours per day, and was paid for 8 hours.

Harry O. Sortors—Leadman in charge of Sub-Stations, handled electrical switching, stood by at Sub-Stations and for a one-year period was a motion picture projectionist. All of said work having been performed during his lunch period. He worked $8\frac{1}{2}$ hours per day and was paid for 8 hours.

Luther M. Walters—Operated the Butane, Oxygen and Acetylene Plants during his shift, includ-

ing the lunch period. Worked 8½ hours per day, and was paid for 8 hours.

Samuel D. Tinker—Operated Acetylene Plant, Oxygen Plant and Propane Plant, and Compressor House. Operated all the equipment at said plants, maintaining said equipment, and standing by at all times during his shift, including the lunch period. Worked 8½ hours per day, was paid for 8 hours.

Frank Hemminger—Operated Sub-Station at all times during his shift including the lunch period. Worked 8½ hours per day and was paid for 8 hours. [19]

Oliver H. Raftery—Operated Sub-Stations, crane maintenance, maintenance electrician on the ways, and performed this work during his shift, including the lunch period; worked 8½ hours per day and was paid for 8 hours.

Fred M. Koehler—Operated Sub-Station at all times during his shift including the lunch period. Worked 8½ hours per day and was paid for 8 hours.

Charles R. Cobb—Operated a Sub-Station and was also a lead-man in charge of Sub-Station Operators. Worked at all times during his shift, including his lunch period. Worked 8½ hours per day; was paid for 8 hours.

Charles E. Smith-Sanford—Operated a Sub-Station at all times during his shift, including the lunch period. Worked 8½ hours per day, and was paid for 8 hours.

The orders under which the claimants were required to stay at their posts during their lunchtime period, were issued by Vern D. Elliott, General Electrical Superintendent of the yard, and relayed to all supervisory personnel under him; the requirements that the above named persons remain at their post during their lunch period was necessarily required due to the nature of their duties and the character and type of the equipment which they were required to maintain.

Dated: May 29, 1947.

MOHR AND BORSTEIN,
By /s/ ALFRED J. BORSTEIN,
Attorneys for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed June 5, 1947. [20]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Consolidated Steel Corporation, hereinafter referred to as the defendant, for its answer to the Complaint on file herein admits, denies and alleges as follows:

I.

Referring to paragraphs I, II and VIII of the Complaint, defendant neither admits nor denies the allegations made therein as to the jurisdiction of the court, for the reason that said allegations constitute statements and conclusions of law and do not constitute statements of facts.

II.

Referring to Paragraph III of the Complaint, defendant admits the allegations made therein. In connection therewith, defendant alleges that its corporate name formerly was Consolidated Steel Corporation, Ltd., but that said name has been changed to [22] and now is Consolidated Steel Corporation.

III.

Referring to Paragraph IV of the Complaint, defendant denies every allegation made therein, except as hereinafter admitted or otherwise alleged. Defendant admits that between July 1, 1942, and August 31, 1946, approximately, defendant engaged in the construction, fabrication and repair of ships and vessels within Los Angeles County, California, pursuant to contracts and commitments with the government of the United States of America and its departments and agencies, including United States Maritime Commission and United States Navy. Defendant denies that said activities constituted engagement in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

IV.

Referring to Paragraph V of the Complaint, defendant admits that for varying periods of time within three years prior to the commencement of the pending action defendant employed the several plaintiffs named in the Complaint and the several additional claimants named in the Bill of Par-

ticulars heretofore filed in the pending action. Defendant denies that said plaintiffs and claimants were continuously so employed during or throughout said three-year period, or that they were employed in the respective job classifications, or that they performed the respective duties stated in Paragraph V of the Complaint or in said Bill of Particulars.

V.

Referring to Paragraph VI of the Complaint, defendant denies every allegation made therein, except as hereinafter admitted or otherwise alleged. Defendant alleges that each and all of the plaintiffs and claimants named in said Bill of Particulars have been fully credited, allowed and compensated for all hours [23] that they worked for defendant during said period, and that they have been compensated and paid at hourly rates of compensation in excess of the minimum rates prescribed in said Act, and they have been compensated and paid at least one and one-half times their respective hourly rates of compensation for all hours in excess of forty hours a week which they may have worked in any work week during said period.

VI.

Referring to Paragraph VII of the Complaint, defendant denies every allegation made therein. Defendant alleges that the failure on its part to pay any claimant herein the amount of compensation to which any such claimant may have been entitled to receive, (if the court finds that there was such a

failure) was not the result of deliberate, wilful or neglectful action on the part of defendant, but was the result of actions and procedures pursued in good faith by defendant.

For a First Affirmative Defense to the Complaint herein, defendant alleges as follows:

I.

Defendant alleges that the services and activities, if any, performed by the plaintiffs and claimants as generally described in the Complaint and further particularized in said Bill of Particulars were not rendered or performed pursuant to any written or unwritten contract or any custom or practice in effect at the time of the performance of said alleged services and activities, between defendant and said plaintiffs and claimants or their agents or collective bargaining representatives.

For a Second Affirmative Defense to the Complaint herein, defendant alleges as follows: [24]

I.

The claims of all the plaintiffs and claimants named in said Bill of Particulars, other than those named in the Complaint on file herein, to wit Glenn O. Prickett, H. F. Winans and S. E. Whitney, for alleged unpaid compensation earned prior to June 5, 1945, are barred by Sections 6, 7 and 8 of the Portal-to-Portal Act of 1947 (Public Law 49, 80th Congress, 1st Session).

For a Third Affirmative Defense to the Complaint herein, defendant alleges as follows:

I.

Defendant alleges that the failure, if any, on the part of defendant to compensate the several plaintiffs and claimants herein for services and activities performed by them during their respective lunch periods, as described in said Complaint and Bill of Particulars, was not the result of any wilful or deliberate failure or refusal on the part of defendant to compensate said claimants for their services, but said failure, if any, was the result of actions and procedures pursued in good faith by defendant, and that for said reason the court should not award said claimants liquidated damages herein.

For a Fourth Affirmative Defense to the Complaint herein, defendant alleges as follows:

I.

The court does not have jurisdiction of the subject matter of the pending action.

Wherefore, defendant prays that the Complaint herein be dismissed, that defendant have judgment for its costs and for such other relief as to the court seems proper.

ALFRED WRIGHT and
HAROLD F. COLLINS,
By /s/ HAROLD F. COLLINS,
Attorneys for Defendant. [25]

State of California,
County of Los Angeles—ss.

John M. Robinson, Jr., being first duly sworn,
deposes and says:

That he is Secretary of Consolidated Steel Cor-

poration, a corporation, Defendant in the above entitled action, and as such officer he is duly authorized to and does make this verification for and on behalf of said corporation; that he has read the foregoing Answer of Defendants and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to such matters, that he believes them to be true.

/s/ JOHN M. ROBINSON, JR.

Subscribed and sworn to before me this 11th day of June, 1947.

[Seal] /s/ EDNA R. WINTER,

Notary Public in and for the County of Los Angeles, State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed June 16, 1947.

At a stated term, to wit: The February Term, A. D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 7th day of March in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable: Peirson M. Hall,
District Judge.

[Title of Cause.]

For pre-trial hearing; Perry Bertram, Esq., appearing as counsel for plaintiffs; Harold Collins, Esq., appearing as counsel for defendant;

Attorney Collins states he consents to the filing of an amended complaint reserving all rights and defenses under pleadings.

On motion of Attorney Bertram, it is ordered that plaintiff is granted 30 days to amend under the jurisdictional requirement under the Portal-to-Portal Act, and allowing defendant 30 days to answer amended complaint. [28]

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR WAGES AND
LIQUIDATED DAMAGES DUE UNDER
THE FAIR LABOR STANDARDS ACT OF
1938

By way of complaint, plaintiffs complain and alleges, as follows:

I.

Plaintiffs bring this action on behalf of themselves and all other employees similarly situated, pursuant to Sec. 16 (b) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Cong., CH. 676, 52 Stat. 1060-1069 (1938), 29 U.S.C. Sec. 201-219), hereinafter referred to as the Act to recover overtime wages, liquidated damages and attorneys' fees.

II.

Jurisdiction of this action is conferred upon the Court by Sec. 16 (b) of the Act and by Sec. 24 (8) of the Judicial Code (28 U.S.C. Sec. 41 (8)). [29]

III.

The other employees similarly situated and on behalf of whom this action is brought are: Luther M. Walters, Samuel D. Tinker, Frank Hemminger, Oliver H. Raftery, Fred M. Koehler, Charles R. Cobb, Charles E. Smith-Sanford. Each of those employees have consented in writing to become parties to this action, their written consents being attached hereto as Exhibits one through seven inclusive and by this reference made a part hereof.

IV.

Defendant is a corporation organized under the laws of the State of California, authorized to do business therein and having its principal place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court.

V.

At all times herein mentioned, defendant was engaged at its said place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court, in interstate commerce and in the production of goods, to-wit, ships, for interstate commerce within the meaning of the Act.

VI.

Within three years last past, defendant employed the plaintiffs and the other employees similarly

situated, on behalf of whom this action is brought, at its said place of business, as maintenance electricians, marine electricians, stationary engineers, operating engineers, mechanical maintenance employees, toolroom attendants, toolroom mechanics, warehousemen, issue and receiving clerks, and in various other crafts and capacities. [30]

VII.

During the respective periods of employment by the defendant, as aforesaid, plaintiffs and said other employees similarly situated, were compensated at various hourly rates, the precise period of employment and hourly rates at which plaintiffs and each such employees were employed are contained in the books and records of the defendant, and are not known to the plaintiffs at the present time. In substantially all of the weeks in which plaintiffs and other employees similarly situated were employed, they were credited with having worked forty-eight (48) hours or more, while employed on the day shift, with having worked forty-five (45) hours or more while on the swing shift, and with having worked forty-two (42) hours or more while employed on the grave-yard shift, for forty (40) hours of which they were paid at straight time, and for all hours for which they were credited in excess of forty (40) hours, they were paid at the rate of time and one-half. In addition to said hours for which they were credited and paid, the plaintiffs and said other employees similarly situated worked one-half ($1\frac{1}{2}$) hour each day, or three (3) hours or more each

week, for which they were not credited and for which they received no compensation whatsoever.

VIII.

The activities which the plaintiffs and said other employees similarly situated performed during each of said one-half ($\frac{1}{2}$) hours each day were and are compensable activities within the meaning of the Fair Labor Standards Act of 1938, as amended by the Portal-to-Portal Act of 1947 by virtue of and in accordance with the express provision of a written collective bargaining agreement then in effect between the plaintiffs, their collective bargaining representatives and the defendant. [31]

IX.

There is now due, owing and unpaid, from the defendant to the plaintiffs, and to each of the employees similarly situated, on behalf of whom this action is brought, a sum equal to one and one-half times the regular rate at which each such employee was employed and for which he was compensated, times three(3) or more hours for each week of his employment by the defendant, and for which he was not paid, plus an equal amount as liquidated damages.

X.

Section 16 (b) of the Act provides that the Court in this action shall, in addition to any judgment awarded to plaintiffs, allow a reasonable attorneys' fee to be paid, by the defendant.

Wherefore, plaintiffs pray judgment against the defendant and in favor of the plaintiffs and each of

the employees similarly situated, on behalf of whom this action is brought, in a sum equal to one and one-half times the regular rate at which each such employee was employed, times three (3) or more hours for which he was not paid in each week of his employment by the defendant, plus an equal amount as liquidated damages, plus attorneys' fees for services rendered herein, and for costs of suit and all proper relief.

MOHR and BORSTEIN and
PERRY BERTRAM.

By /s/ PERRY BERTRAM,

Attorneys for Plaintiffs. [32]

EXHIBIT 1

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Charles R. Cobb hereby consents to become a party plaintiff in the above entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: March 11, 1949.

/s/ CHARLES R. COBB. [33]

EXHIBIT 2

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Frank Hemminger hereby consents to become a party plaintiff in the above en-

titled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: April 1, 1949.

/s/ FRANK HEMMINGER. [34]

EXHIBIT 3

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Fred M. Koehler hereby consents to become a party plaintiff in the above entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: March 11, 1949.

/s/ FRED M. KOEHLER. [35]

EXHIBIT 4

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Oliver H. Raftery hereby consents to become a party plaintiff in the above entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: March 12, 1949.

/s/ OLIVER H. RAFTERY. [36]

EXHIBIT 5

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Charles E. Smith-Sanford hereby consents to become a party plaintiff in the above

entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: March 12, 1949.

/s/ CHARLES E. SMITH-
SANFORD. [37]

EXHIBIT 6

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Harry Sortors hereby consents to become a party plaintiff in the above entitled consents to become a party plaintiff in the above entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: March 30, 1949.

/s/ HARRY SORTORS. [38]

EXHIBIT 7

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Luther M. Walters hereby consents to become a party plaintiff in the above entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938 as amended.

Dated: March 14th, 1949.

/s/ LUTHER M. WALTERS. [39]

State of California,

County of Los Angeles—ss.

Harry Sortors being by me first duly sworn, de-

poses and says: that he is the plaintiff in the above entitled action; that he has read the foregoing amended complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ HARRY SORTORS.

Subscribed and sworn to before me this 4th day of April, 1949.

[Seal] /s/ ELIZABETH N. DUMESNIL,
Notary Public in and for the County of Los Angeles
State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed April 6, 1949. [40]

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION OF FACTS AND,
STATEMENT OF ISSUES

Stipulation of Facts

It is hereby stipulated between the plaintiffs and defendant, through their respective counsel:

I.

The present name of the defendant is Consolidated Liquidating Corporation, and the pleadings on file may be amended to show said name in place of the name Consolidated Steel Corporation.

II.

At all times material to this action and during the employment by defendant of one or more of the plaintiffs and claimants, to-wit, from January 16, 1944 to and including November 29, 1946, the defendant produced ships under contract [41] with the United States Maritime Commission at shipyards at Wilmington, in the City and County of Los Angeles, State of California. Upon completion of construction, each ship was delivered to the United States Maritime Commission at said shipyards, and thereafter was sent by the United States Maritime Commission to points outside the State of California.

III.

During certain periods of the employment by defendant of one or more of the plaintiffs and claimants, to-wit, between January 1, 1945 and November 29, 1946, the defendant repaired and decommissioned Naval ships and vessels belonging to the United States Navy pursuant to contracts and commitments with the United States Navy.

IV.

Plaintiffs' Exhibit 1 is a copy of the collective bargaining agreement in existence between collective bargaining representatives of plaintiffs and claimants and the defendant during the periods to which plaintiffs' and claimants' claims relate.

V.

Defendant's Exhibit A is a copy of a government-owned facilities contract between the United States Maritime Commission and the defendant, which

contract states the terms under which the defendant operated shipyards at Wilmington, California on premises provided by said United States Maritime Commission. Said contract was in effect during all the time material to the issues presented herein, and related to the place at which plaintiffs and claimants performed the services which are the basis of the claims asserted in this action.

VI.

Defendant's Exhibit B is a copy of one of the vessel construction contracts between the United States Maritime [42] Commission and the defendant, which contract was in effect during the time material to the issues and claims asserted in this action.

Issues

1. Does the complaint state a claim of which this court has jurisdiction?

2. Were the plaintiffs and claimants employed by the defendant in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938, as amended?

3. In which workweeks, if any, did each of the plaintiffs and claimants work during their lunch periods?

4. If any lunch periods were worked by plaintiffs and claimants, was that work compensable under the collective bargaining agreement, Exhibit 1?

5. If such lunch periods were so compensable, was the failure by defendant to pay plaintiffs and claimants therefor in good faith?

6. Are the claims of the plaintiffs and claimants for compensation alleged to have been earned prior to May 14, 1945, barred by Sections 6, 7 and 8 of the Portal-to-Portal Act of 1947?

February 24, 1949.

MOHR & BORSTEIN and
PERRY BERTRAM,

By /s/ PERRY BERTRAM,
Attorney for Plaintiffs.

ALFRED WRIGHT and
HAROLD F. COLLINS,

By /s/ HAROLD F. COLLINS,
Attorneys for Defendant.

[Endorsed]: Filed April 28, 1949. [43]

[Title of District Court and Cause.]

NOTICE OF MOTIONS: TO DISMISS AMEND-
ED COMPLAINT, TO DISMISS CLAIMS
OF CERTAIN CLAIMANTS, TO STRIKE
CERTAIN MATTER, FOR A MORE DEFINITE STATEMENT

To the Plaintiffs and Other Claimants Herein, and
to Their Attorneys, Mohr & Borstein and Perry
Bertram:

Please Take Notice that on Monday, May 23, 1949,
at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, in the court room of the Hon. Peirson M. Hall, United States District Judge, located in the United States Post Office and Court House at Los Angeles, California, the defendant,

Consolidated Liquidating Corporation (sued and designated in the Amended Complaint under its former corporate name, Consolidated Steel Corporation, Ltd.), by and through its attorneys herein, will present motions for orders and relief, as follows:

I.

To dismiss the Amended Complaint and the pending action in its entirety. [109]

Said motion will be presented and urged upon the ground that the Amended Complaint fails to state a claim upon which relief can be granted against the defendant, particularly by reason of the provisions of the Portal-to-Portal Act of 1947 (29 USC 251, et seq) which delimit the types of activities which are compensable under the Fair Labor Standards Act of 1938, and further limit the jurisdiction of both Federal and State courts to proceedings to enforce liability only for activities of the types recognized as compensable.

II.

To dismiss the Amended Complaint and pending action to the extent that it purports to assert claims on behalf of "other employees similarly situated" to the plaintiffs Glenn O. Prickett, H. F. Winans and S. E. Whitney, which "other employees similarly situated" appear to be the following persons: Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Sanford, Samuel D. Tinker, Luther M. Walters.

Said motion will be presented as an alternative to

the preceding motion, and will be urged upon the additional grounds that it appears upon the face of the Amended Complaint and from the exhibits attached thereto that the alleged claims of the above-named claimants accrued prior to the enactment of the Portal-to-Portal Act of 1947, on May 14, 1947; that said claimants were not parties plaintiff herein at any time prior to May 14, 1947; that said claimants did not become parties plaintiff herein within one hundred and twenty (120) days after the date of the enactment of the Portal-to-Portal Act of 1947; that the [110] pending action may not be considered pending as to said claimants at any time prior to April 6, 1949, the date on which their purported respective written Consents to participate in this action were filed in this Court; that by reason of the foregoing facts said claimants have no status in the pending action, and their alleged claims are barred by the applicable statute of limitations, all as provided in the Portal-to-Portal Act of 1947 (29 USC 251, et seq).

III.

To strike from the amended Complaint the following matter:

(a) Paragraph I, page 1, line 22, the words "and all other employees similarly situated."

(b) Paragraph III, page 2, lines 1 to 9, inclusive, the entire paragraph as follows:

"The other employees similarly situated and on behalf of whom this action is brought are: Luther M. Walters, Samuel D. Tinker, Frank Hemminger, Oliver H. Raftery, Fred M. Koehler, Charles R.

Cobb, Charles E. Smith-Sanford. Each of those employees have consented in writing to become parties to this action, their written consents being attached hereto as Exhibits one through seven inclusive and by this reference made a part hereof.", together with the several exhibits Nos. 1 to 7, inclusive, mentioned therein and attached to the Amended Complaint.

(c) Paragraph VI, page 2, line 24, the words "and other employees similarly situated."

(d) Paragraph VI, page 3, the several words and clauses as follows: "and said other employees similarly [111] situated" in lines 3 and 4; "and each such employees" in line 6; "and other employees similarly situated" in line 9; "and other employees similarly situated" in line 19.

(e) Paragraph VIII, page 3, lines 24 and 25, the words: "and said other employees similarly situated."

(f) Paragraph IX, page 4, lines 3, the words: "and to each of the employees similarly situated on behalf of whom this action is brought."

(g) Concluding paragraph, page 4, lines 16 and 17, the words: "and each of the employees similarly situated on behalf of whom this action is brought."

Said Motion to Strike each of the foregoing portions of the Amended Complaint will be presented as an alternative to the foregoing motions and will be urged upon the ground that "employees similarly situated," including those named in Paragraph III thereof, have no standing as parties or litigants in this action and no claims can be asserted in their

behalf by plaintiffs herein for the reasons, as more particularly stated in the foregoing Motions, that said claims have not been presented in the manner or within the time required by the Portal-to-Portal Act of 1947, and as a result this Court has no jurisdiction to consider or determine the alleged claims of any "employee similarly situated" to plaintiffs.

IV.

For more definite statement of certain matters alleged in Paragraph VIII of the Amended Complaint, to wit:

(a) the particular language of the alleged "express provision of a written collective bargaining agreement" under and pursuant to which "activities * * * performed during each of said one-half (1½) hours [112] each day were and are compensable activities within the meaning of the Fair Labor Standards Act of 1938, as amended, by the Portal-to-Portal Act of 1947."

Said Motion will be presented and urged as an alternative to defendant's Motion to dismiss the Amended Complaint and pending action, and will be based upon the ground that the allegations contained in said Paragraph VIII are so vague and ambiguous that defendant cannot reasonably be required to frame a responsive pleading thereto; and said allegations are mere conclusions of the pleader which are uninformative in fact and insufficient in law.

The foregoing Motions will be based upon the pleadings and records herein, and defendant will

rely upon the Memorandum of Points and Authorities In Support of Motions, which is presented herewith.

Dated at Los Angeles, California, this 5th day of May, 1949.

ALFRED WRIGHT and
HAROLD F. COLLINS

By/s/ HAROLD F. COLLINS,
Attorneys for Consolidated
Liquidating Corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed May 5, 1949. [113]

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 23rd day of May, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

For hearing on motion of defendant Consolidated Liquidating Corp. to dismiss the amended complaint, to dismiss claims of certain claimants, to strike certain matter, and for a more definite statement, pursuant to notice thereof filed May 5, 1949; Perry Bertram, Esq., appearing as counsel for

plaintiffs; H. F. Collins, Esq., appearing as counsel for defendant;

Attorney Collins makes a statement in support of motion to dismiss. Attorney Bertram argues in opposition to motion to dismiss.

Court orders motion to dismiss as to parties similarly designated granted, and as to parties-plaintiff denied with ten days allowed to amend the amended complaint and Court orders cause continued to June 27, 1949, 10 a.m., for setting. [124]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant, Consolidated Steel Corporation,
and to Alfred Wright and Harold F. Collins,
Esqs., its attorneys, and to the Clerk of the
above-entitled Court:

Notice is hereby given that plaintiffs, Luther M. Walters, Samuel D. Tinker, Frank Hemminger, Oliver H. Raftery, Fred M. Koehler, Charles R. Cobb and Charles E. Smith-Sanford, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment of Dismissal as to each of them, entered in this action on May 23rd, 1949.

Dated: June 22, 1949.

MOHR and BORSTEIN and
PERRY BERTRAM

By /s/ DAVID L. MOHR,

Attorneys for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed June 22, 1949. [125]

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME TO FILE
RECORD AND DOCKET APPEAL, AND
ORDER GRANTING TIME

It is hereby stipulated by and between plaintiffs and appellants and defendant and appellee, through their respective attorneys, that the time within which to file the record and docket the appeal herein may be extended to the 20th day of September, 1949.

Dated: July 22, 1949.

MOHR and BORSTEIN and
PERRY BERTRAM

By /s/ DAVID L. MOHR,
Attorneys for Plaintiffs and
Appellants.

ALFRED WRIGHT and
HAROLD F. COLLINS,

By /s/ HAROLD F. COLLINS,
Attorneys for Defendant and
Appellee.

It Is So Ordered.

Dated: July 27, 1949.

/s/PEIRSON M. HALL,
Judge. [127]

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil No. 6274-PH

GLENN O. PRICKETT, et al.,
Plaintiffs and Appellants,

vs.

CONSOLIDATED STEEL CORPORATION,
Defendant and Appellee.

ORDER OF DISMISSAL AS TO
CERTAIN PLAINTIFFS

The motions of defendant, Consolidated Liquidating Corporation, sued herein as Consolidated Steel Corporation to dismiss the amended complaint as to the Plaintiffs and as to certain other claimants having come on regularly for hearing before this Court on May 23, 1949, and the plaintiffs and other claimants being represented by their counsel, Mohr and Borstein and Perry Bertram, by Perry Bertram, and the defendant being represented by its counsel, Alfred Wright and Harold F. Collins, by Harold F. Collins, and arguments having been presented on behalf of both parties, the Court being fully advised, and the matter being submitted.

It Is Ordered and Adjudged, that the motion to dismiss certain claimants named in the amended complaint is hereby granted as to the following named claimants, to wit: [128] Charles R. Cobb,

Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Sanford, Samuel D. Tinker, Luther M. Walters.

It Is Further Ordered and Adjudged, that the motion to dismiss the amended complaint as to Glenn O. Prickett, H. F. Winans and S. E. Whitney, is denied.

It Is Further Ordered and Adjudged, that the motion to strike from the amended complaint be and the same hereby is denied.

It Is Further Ordered and Adjudged, that the motion for a more definite statement be and the same hereby is denied.

Dated: 9/8/49, 1949.

/s/ PEIRSON M. HALL,
Judge.

Approved As To Form:

Dated: Sept. 7, 1949.

ALFRED WRIGHT &
HAROLD F. COLLINS

By /s/ HAROLD F. COLLINS,
Attorneys for Defendant.

Judgment entered Sept. 8, 1949.

Docketed Sept. 8, 1949.

[Endorsed]: Filed Sept. 8, 1949. [129]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant and Appellee and to the Clerk
of the United States District Court:

Please Take Notice that the plaintiffs hereby appeal to the Court of Appeals for the Ninth Circuit from that portion of the Order of Dismissal in the above-entitled case signed September 8, 1949, filed and entered September 8, 1949 which dismisses the claims of Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Sanford, Samuel D. Tinker and Luther M. Walters.

Dated: September 8, 1949.

MOHR and BORSTEIN and
PERRY BERTRAM

By /s/ PERRY BERTRAM,

Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 8, 1949. [130]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellants hereby designate the following pleadings and exhibits to be prepared and forwarded to the Court of Appeals, Ninth Circuit, as the record on the appeal:

1. Complaint. Filed 1/16/47.
2. Notice of Motions: To dismiss action, to

strike matters, for more definite statement, and for bill of particulars. Filed 4/11/47.

3. Order of May 12, 1947 on Motions to Dismiss, etc.

4. Bill of Particulars. Filed 6/5/47.

5. Answer to Complaint. Filed 6/16/47.

6. Pre-Trial Stipulation of Facts and Statement of Issues. Filed 4/28/49.

7. Order on Pre-Trial Conference. Filed 3/7/49.

8. Amended Complaint. Filed 4/6/49. [132]

9. Notice of Motion by Defendant to Dismiss Certain Plaintiffs in Amended Complaint. Filed 5/5/49.

10. Order Granting Motion to Dismiss as to Parties Similarly Situated. Filed 5/23/49.

11. Notice of Appeal. Filed 6/22/49.

12. Order of Dismissal entered September 8, 1949. Filed 9/8/49.

13. Notice of Appeal from said Order of Dismissal. Filed 9/8/49.

Dated: September 7, 1949.

MOHR and BORSTEIN and
PERRY BERTRAM

By /s/ PERRY BERTRAM,
Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 8, 1949. [133]

[Title of District Court and Cause.]

STIPULATION RE CLERK'S RECORD
ON APPEAL AND WAIVER

It Is Hereby Stipulated, by and between the plaintiffs and appellants and the defendant and appellee, by and through their respective counsel, that the Clerk's record designated by the plaintiffs and appellants shall be the record on appeal and the defendant and appellee hereby waives the right to designate further or additional record to be included therein.

Dated: September 7, 1949.

MOHR and BORSTEIN and
PERRY BERTRAM

By /s/ PERRY BERTRAM,
Attorneys for Plaintiffs.

ALFRED WRIGHT &
HAROLD F. COLLINS

By /s/ HAROLD F. COLLINS,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 8, 1949. [135]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 135, inclusive, contain the original Complaint for Wages and Liquidated Dam-

ages Due Under the Fair Labor Standards Act of 1938; Notice of Motions to Dismiss Action; to Strike Matter; for More Definite Statement and Bill of Particulars and Memorandum of Points and Authorities; Bill of Particulars; Answer to Complaint; Amended Complaint for Wages and Liquidated Damages Due Under the Fair Labor Standards Act of 1938; Pre-Trial Stipulation of Facts and Statement of Issues and Exhibits thereto; Notice of Motions to Dismiss Amended Complaint; to Dismiss Claims of Certain Claimants; to Strike Certain Matter for a More Definite Statement and Memorandum of Points and Authorities in Support of Motions; Notice of Appeal filed June 22, 1949; Stipulation and Order Extending Time to File Record and Docket Appeal; Order of Dismissal as to Certain Plaintiffs; Notice of Appeal filed Sept. 8, 1949; Designation of Record on Appeal and Stipulation re Clerk's Record on Appeal and Waiver and full, true and correct copies of minute orders entered May 12, 1947, March 7, 1949 and May 23, 1949 which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 16th day of September, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12360. United States Court of Appeals for the Ninth Circuit. Glenn O. Prickett, H. F. Winans and S. E. Whitney, on behalf of themselves and other employees similarly situated, Appellants, vs. Consolidated Liquidating Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed September 19, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the U. S. Circuit Court of Appeals,
Ninth Circuit
No. 12360

GLENN O. PRICKETT, et al,
Appellants,
vs.

CONSOLIDATED LIQUIDATING CORP.,
Appellee.

STATEMENT OF POINTS
ON APPEAL

Appellants in the above entitled action in compliance with Rule 19, subdivision 6, of the Rules of Practice of the above entitled court herewith submit their points on appeal:

The court erred:

1. In requiring the appellants to file consents to become parties plaintiff.

2. In ruling that the appellants were required to file consents to become parties plaintiff on or before ninety (90) days following the effective date of the Portal-to-Portal Act of 1947.

3. In dismissing the appellants' causes of action on the ground that appellants had not complied with the requirements pertaining to representative actions as provided in the Portal-to-Portal Act of 1947.

4. In granting defendant's motion to dismiss appellants' causes of action.

September 22, 1949.

Respectfully submitted,

MOHR & BORSTEIN and
PERRY BERTRAM,

By /s/ PERRY BERTRAM.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 22, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

To the Clerk of the above entitled court and to the Appellee above named and to Wright and Collins, its attorneys:

Appellant hereby designates as the record to be

printed on the appeal herein, the entire Clerk's Transcript of Record, except, and it hereby requests to be omitted from the printed record, the following portions of the Clerk's Transcript:

Pages 10 to 14, inclusive, being Memorandum of Points and Authorities in Support of Defendant's Motions to Dismiss, to Strike, and for a More Definite Statement, filed April 11, 1947.

Pages 44 to 108, inclusive, being the Collective Bargaining Agreement between the parties attached as Plaintiffs' Exhibit 1 to the Pre-Trial Stipulation; the Maritime Commission Contract attached as Defendant's Exhibit A to said Pre-Trial Stipulation; and the Vessel Construction Contract attached as Defendant's Exhibit B to said Pre-Trial Stipulation.

Pages 114 to 122, inclusive, being the Memorandum of Points and Authorities in Support of Defendant's Motions directed to the Amended Complaint, filed May 5, 1949.

Respectfully submitted,
MOHR & BORSTEIN and
PERRY BERTRAM,

By/s/ PERRY BERTRAM.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 22, 1949.

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil Action No. 6274-PH

GLENN O. PRICKETT, et al.,

Plaintiffs,

vs.

CONSOLIDATED STEEL CORPORATION,
Defendant.

FINAL JUDGMENT OF DISMISSAL

In the above matter, the motion of defendant, Consolidated Liquidating Corporation, to dismiss the amended complaint as to certain plaintiffs having come on regularly for hearing before this Court on May 23, 1949, and the plaintiffs being represented by their counsel, Mohr and Borstein and Perry Bertram, by Perry Bertram, and the defendant being represented by its counsel, Alfred Wright and Harold F. Collins, by Harold F. Collins, and arguments having been presented on behalf of both parties, the Court being fully advised, and the matter being submitted, and

The said motion to dismiss, on May 23, 1949, having been granted as to the following named plaintiffs: Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Stanford, Samuel D. Tinker and Luther M. Walters;

The Court finds and determines that there is no just reason for delaying entry of a final judgment of dismissal as to said Plaintiffs;

It Is Hereby Ordered and Adjudged that the claims of plaintiffs, Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Stanford, Samuel D. Tinker and Luther M. Walters, be, and the same are, dismissed.

The Court hereby expressly directs the entry of this Judgment of Dismissal.

Dated July 9, 1951.

/s/ PEIRSON M. HALL,
U. S. District Judge.

Approved as to form, this 29th day of June, 1951.

ALFRED WRIGHT, and

HAROLD F. COLLINS,

By /s/ HAROLD F. COLLINS,
Attorneys for Defendant.

Docketed and entered July 10, 1951.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant and Appellee and to the Clerk of
the United States District Court:

Please Take Notice that the plaintiffs hereby appeal to the Court of Appeals for the Ninth Circuit from that portion of the Order of Dismissal in the above-entitled case signed and filed July 9, 1951;

docketed and entered July 10, 1951, which dismisses the claims of Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Stanford, Samuel D. Tinker and Luther M. Walters.

Dated July 12, 1951.

MOHR AND BORSTEIN, and
PERRY BERTRAM,

By /s/ DANIEL L. MOHR,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 12, 1951.

Affidavit of Service by Mail attached.

[Title of District Court and Cause.]

STIPULATION RE CLERK'S RECORD ON
APPEAL AND WAIVER

It Is Hereby Stipulated, by and between the plaintiffs and appellants and the defendant and appellee, by and through their respective counsel, that the Clerk's record heretofore certified to the Court of Appeals in Civil Appeal No. 12,360, plus the Final Judgment of Dismissal entered herein July 10, 1951, together with Notice of Appeal and this Stipulation, shall be the record on appeal and the

parties hereby waive the right to designate further or additional record to be included therein.

Dated July 23, 1951.

MOHR AND BORSTEIN, and
PERRY BERTRAM,

By /s/ PERRY BERTRAM,
Attorneys for Plaintiffs.

ALFRED WRIGHT, and
HAROLD F. COLLINS,

By /s/ HAROLD F. COLLINS,
Attorneys for Defendant.

[Endorsed]: Filed July 27, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 6, inclusive, contain the original Final Judgment of Dismissal; Notice of Appeal and Stipulation re Clerk's Record on Appeal and Waiver which, together with the Transcript of Record on the former appeal in this case being No. 12360 in the United States Court of Appeals for the Ninth Circuit, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.20 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 8th day of August, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13049. United States Court of Appeals for the Ninth Circuit. Glenn O. Prickett, et al., Appellants, vs. Consolidated Steel Corporation, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 9, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13049

GLENN O. PRICKETT, et al.,

Appellants,

vs.

CONSOLIDATED LIQUIDATING CORP.,

Appellee.

STIPULATION AND ORDER RE RECORD ON
APPEAL, STATEMENT OF POINTS ON
APPEAL AND BRIEFS

For the reason that the record on the previous appeal in the above-entitled matter, being Appeal No. 12360, contains the identical record which is to be presented to the Court in the instant appeal, augmented only by the final Judgment entered herein, the Notice of Appeal, and the Stipulation re Record on Appeal, and for the reason that the briefs heretofore submitted by the respective parties in said earlier Appeal No. 12360 contain the identical arguments and identical citation of authorities which are to be presented to the Court on this appeal, and for the further reason that duplication of said record and duplication of said briefs would unnecessarily burden the parties with additional cost and expenses,

It is hereby stipulated by and between the parties as follows:

1. The record on appeal in Appeal No. 12360 in

the above-entitled matter is hereby designated as the record on appeal in this Appeal No. 13049, the same to be used without being reprinted, with the exception that to said record is to be added the following documents hereby designated by the parties as additional record on appeal:

(a) Final Judgment of Dismissal entered July 10, 1951.

(b) Notice of Appeal dated July 12, 1951.

(c) Stipulation Re Clerk's Record on Appeal and Waiver.

2. It is further stipulated that the briefs heretofore filed by the respective parties in Appeal No. 12360 be received by the Court as the respective briefs of the parties on this Appeal No. 13049, provided, however, that either party may, within the time allowed by the Rules for the filing of briefs on appeal, file supplemental brief covering any points or authorities not included in their briefs in Appeal No. 12360, or, in the alternative and within the same time, may file a statement with the Clerk of the Court that they or either of them do not propose to file such supplemental brief.

3. It is further stipulated that the Appellants' Statement of Points on Appeal now included in the record in Appeal No. 12360 be deemed to be the Appellants' Statement of Points on Appeal in this appeal No. 13049.

By the foregoing stipulation neither of the parties

waives the right to oral argument before the Court.

August 18, 1951.

MOHR AND BORSTEIN, and

PERRY BERTRAM,

By /s/ PERRY BERTRAM,

Attorneys for Appellants.

ALFRED WRIGHT, and

HAROLD F. COLLINS,

By /s/ HAROLD F. COLLINS,

Attorneys for Appellee.

ORDER

Upon the filing of the foregoing stipulation, and good cause appearing therefor, it is so ordered.

August 21, 1951.

/s/ CLIFTON MATHEWS,

/s/ WILLIAM HEALY,

/s/ WM. E. ORR,

Judges U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed Aug. 27, 1951.

6014
No. 13050

United States
Court of Appeals
for the Ninth Circuit

GILBERT WADDELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

NOV 14 1951



No. 13050

United States
Court of Appeals
for the Ninth Circuit

GILBERT WADDELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Burda, Helene

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1. The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the human brain, and the second part to a description of the results of the experiments.

APPEARANCES

For Petitioner:

JAMES T. BUTLER, Esq.

For Respondent:

JOHN D. PICCO, Esq.



The Tax Court of the United States

Docket No. 24483

GILBERT WADDELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1949

Aug. 8—Petition received and filed. Fee not paid.

Sep. 20—Fee paid. Check.

Oct. 4—Order to show cause on or before November 30, 1949 entered. Imperfect.

Oct. 31—Entry of appearance of James T. Butler as counsel filed.

Nov. 25—Amended petition filed by petitioner. Copy served 11/25/49.

Nov. 25—Order, that the order to show cause dated Oct. 4, 1949 is discharged and the proceeding is stricken from the calendar of November 30, 1949 and the respondent allowed the usual time to move or answer the amended petition, entered.

1950

Jan. 10—Answer to amended petition filed by General Counsel.

1950

Jan. 10—Request for hearing in Portland, Oregon, filed by General Counsel.

Jan. 17—Notice issued placing proceeding on Portland, Oregon, Calendar. Service of answer and request made.

Feb. 14—Request for Place of Hearing at Boise, Idaho, filed by petitioner. Denied 2/15/50.

Aug. 29—Hearing set Oct. 23, 1950, Portland.

Oct. 26—Hearing had before Judge Van Fossan on merits. Stipulation of Facts and Exhibits 1-A through 4-D filed. Petitioner's brief Dec. 26, 1950. Respondent's brief Feb. 9, 1951. Petitioner's reply Feb. 26, 1951.

Nov. 13—Transcript of Hearing 10/26/50 filed.

Dec. 21—Brief filed by taxpayer. Copy served.

1951

Feb. 9—Reply Brief filed by General Counsel.

Apr. 11—Memorandum Findings of Fact and Opinion rendered. J. Van Fossan. Decision will be entered for respondent. Copy served.

Apr. 11—Decision entered, Van Fossan J., Div. 9.

July 9—Petition for Review by U. S. Court of Appeals for the Ninth Circuit with assignments of error filed by taxpayer.

July 11—Proof of Service of Notice of Appeal and Petition for Review filed by General Counsel.

The Tax Court of the United States

Docket No. 24483

GILBERT WADDELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED PETITION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AGC:IB) dated March 4, 1949, and as a basis for this proceeding alleges as follows:

I.

That Petition is an individual with residence and address as follows: c/o Morrison-Knudsen Afghanistan, Inc., Kandahar, Afghanistan; that the return for the period here involved was filed with the Collector for the district of Idaho;

II.

That the notice of deficiency, a copy of which is marked "Exhibit A" and attached hereto, was mailed to Petitioner on or about March 4, 1949;

III.

That the taxes in controversy are income taxes for the calendar year, 1947, and in the amount of \$2,-362.65 with interest at the rate of 6% per annum until paid, the whole of which has been determined with-

out [5] reference to the facts hereinafter set forth and the provisions of Section 116(a), U. A. Internal Revenue Code applicable thereto.

IV.

That the determination of tax as set forth in said notice of deficiency is based upon errors as follows:

That contrary to law in such cases made and provided, and the undisputed facts hereinafter set forth in paragraph V hereof, the Commissioner has denied to Petitioner tax exempt status as to income earned by him in a foreign country while he was a bona fide resident of that foreign country during the entire year 1947; that Petitioner's case is governed by the law as set forth in Section 116(a), of the U. S. Internal Revenue Code, and in Regulations 111, Section 29.116-1 (as amended), but that the Commissioner has unlawfully denied to Petitioner the benefits thereof, saying: "From the information submitted by you, it appears that you do not qualify to claim the benefits of the Internal Revenue Code, Section 116A. The tax on \$11,050 adjusted gross income is \$2,362.65."

V.

That the facts, upon which Petitioner relies as the basis for this proceeding, are as follows:

(a) That Petitioner was divorced from his former wife during the month of February, 1946, and at all times since said date he has been and now is a single man;

(b) That, as the issue of the marriage above-referred to, there were born three daughters, namely:

(Mrs.) Helene Burda, 421 8th St., Huntington Beach, Calif.

(Mrs.) Geraldine Surgeson, 836 Taylor St., Kennett Square, Penna., and Joanne Waddell, age 15, 421 8th Street, Huntington Beach, Calif., whose care and custody have been awarded to and are now vested in Petitioner.

(c) That pursuant to the decree of divorce, in the action referred to in paragraph V(a), above, Petitioner is obligated to pay and has paid each month since February, 1946, the sum of \$100, as alimony to his divorced spouse, and that the obligation to continue such payments will continue during the remainder of the joint lives of Petitioner and his former spouse;

(d) That prior to May 3, 1946, Petitioner had for approximately 25 years been employed by the United States Department of the Interior, Bureau of Reclamation, as an engineer, as a specially-trained expert in the use of soils in the construction of earth-dams, for irrigation and other purposes; that in said period of approximately 25 years, Petitioner had acquired a high Civil Service rating and had built up a very valuable and substantial retirement pension, which would become payable to him upon reaching retirement age, provided he continued to serve as an employee of the U. S. Government until that time.

(e) That heretofore and in the month of April, 1946, Petitioner was approached by agents of Morrison-Knudsen Afghanistan, Inc., a Nevada corporation, engaged in the performance of construction contracts in the Kingdom of Afghanistan, who offered

Petitioner employment with that corporation in that country;

(f) That as part of the inducement to Petitioner, said agents of said corporation advised Petitioner that he was one of very few men in the world who were expert in the use of soils in earth-dam construction; that said corporation and its affiliates were engaged in the construction of irrigation dams and related projects in many foreign countries; that in said engagements, the use of earth-dams would be required almost exclusively by economic and other factors; that present and anticipated projects would continue into the future for a long and indefinite period, estimated as likely to continue well beyond the time when Petitioner would wish to retire from construction work and that Petitioner could rely upon future foreign employment with said corporation and its affiliates for the remainder of his active professional life;

(g) That in reliance upon the inducements in paragraph V(f) described, Petitioner concluded to enter upon a career of foreign service with said corporation and its affiliates and, in doing so, to sacrifice the security offered by his employment with the Bureau of Reclamation and the valuable retirement benefits to which he would soon become entitled, as described in paragraph V(d) above; (that Petitioner made such a sacrifice for an offer of mere temporary employment, as contended by the Commissioner, seems improbable in the extreme, even if further proof against the contention were not available);

(h) That thereafter and on May 3, 1946, Peti-

tioner resigned from the Bureau of Reclamation by letter of that date, in which it was stated that the reason for resignation was to accept employment with a company engaged in irrigation development in foreign countries;

(i) That thereafter Petitioner entered into a contract with said corporation, dated May 9, 1946, pursuant to which he left the Port of New York on May 23, 1946, to take up his employment with said corporation in Afghanistan, which country he reached on or about the 13th day of June, 1946;

(j) That during the period beginning in the early part of April and ending when Petitioner left the United States on May 23, 1946, Petitioner discussed his plans with various people, and in doing so disclosed his intention of entering upon a career of foreign employment; that some of the persons to whom these disclosures were made were his daughters, his attorney, his immediate superior in the U. S. Reclamation Bureau and other persons with whom it was necessary to make the arrangements necessary in view of an extended and indefinite foreign residence and occupation;

(k) That the contract made on May 9, 1946, between Petitioner and the corporation, was, by its terms, limited to a period of slightly more than two years, but that the reason for the time limitation was for purposes of determining compensation, vacation and other extraneous matters and was never intended either by Petitioner or his employer to be significant as to the length of time for which Petitioner would be employed by the said corporation,

Petitioner employment with that corporation in that country;

(f) That as part of the inducement to Petitioner, said agents of said corporation advised Petitioner that he was one of very few men in the world who were expert in the use of soils in earth-dam construction; that said corporation and its affiliates were engaged in the construction of irrigation dams and related projects in many foreign countries; that in said engagements, the use of earth-dams would be required almost exclusively by economic and other factors; that present and anticipated projects would continue into the future for a long and indefinite period, estimated as likely to continue well beyond the time when Petitioner would wish to retire from construction work and that Petitioner could rely upon future foreign employment with said corporation and its affiliates for the remainder of his active professional life;

(g) That in reliance upon the inducements in paragraph V(f) described, Petitioner concluded to enter upon a career of foreign service with said corporation and its affiliates and, in doing so, to sacrifice the security offered by his employment with the Bureau of Reclamation and the valuable retirement benefits to which he would soon become entitled, as described in paragraph V(d) above; (that Petitioner made such a sacrifice for an offer of mere temporary employment, as contended by the Commissioner, seems improbable in the extreme, even if further proof against the contention were not available);

(h) That thereafter and on May 3, 1946, Peti-

tioner resigned from the Bureau of Reclamation by letter of that date, in which it was stated that the reason for resignation was to accept employment with a company engaged in irrigation development in foreign countries;

(i) That thereafter Petitioner entered into a contract with said corporation, dated May 9, 1946, pursuant to which he left the Port of New York on May 23, 1946, to take up his employment with said corporation in Afghanistan, which country he reached on or about the 13th day of June, 1946;

(j) That during the period beginning in the early part of April and ending when Petitioner left the United States on May 23, 1946, Petitioner discussed his plans with various people, and in doing so disclosed his intention of entering upon a career of foreign employment; that some of the persons to whom these disclosures were made were his daughters, his attorney, his immediate superior in the U. S. Reclamation Bureau and other persons with whom it was necessary to make the arrangements necessary in view of an extended and indefinite foreign residence and occupation;

(k) That the contract made on May 9, 1946, between Petitioner and the corporation, was, by its terms, limited to a period of slightly more than two years, but that the reason for the time limitation was for purposes of determining compensation, vacation and other extraneous matters and was never intended either by Petitioner or his employer to be significant as to the length of time for which Petitioner would be employed by the said corporation,

either in Afghanistan or elsewhere, and that said contract was written on a standard printed form in use by said corporation in connection with virtually all its employment of personnel in foreign countries, and that, despite the time limitation contained in said printed contract, both the said corporation and its entire group of employees in foreign countries consider that the employment under said uniform contract is permanent in duration and in no sense limited by the time period uniformly expressed therein;

(l) That Petitioner arrived in Afghanistan in the month of June, 1946, and immediately entered upon the duties of his employment; that he intended to and did then and there establish his residence in Afghanistan; that he lived in a brick building built and maintained for the convenience of its unmarried employees by said corporation and took his meals at a dining room also maintained on the same basis by said corporation; that Petitioner was at all times free to arrange for board and lodging elsewhere in Kandahar, Afghanistan, but that the quarters, food and water made available to him by his said employer were so far superior, from the standpoint of comfort, convenience and health considerations, that to exercise his freedom of choice in favor of other living arrangements would have been unjustifiable and dangerous in the extreme;

(m) That, by reason of the contractual relationships made and existing between Petitioner's employer and the Kingdom of Afghanistan, Petitioner is informed and believes that the Afghan Government

considers Petitioner to be an employee of the Afghan Government, whose compensation is paid by said Government through said corporation, acting as agent for said Government;

(o) That although, by its terms, Petitioner's contract of employment, as explained in paragraph V(k) above, terminated on June 20, 1948, Petitioner has continued to be employed by said corporation under a renewal or extension of said contract and that he has reason to believe that he will continue to be employed in foreign construction work for a long and indefinite future period;

(p) That Petitioner has, at all times herein mentioned, been aware of the tax benefit, accorded to U. S. Citizens acquiring foreign residence, by the terms of Section 116(a) of the U. S. Internal Revenue Code; that in view thereof he did everything he could do to establish foreign residence in the Kingdom of Afghanistan in the year 1946, so that said benefits would be available to him for the taxable calendar year 1947; that for the year 1947 Petitioner filed with the U. S. Collector at Boise, Idaho, a tax return, enclosing letter reporting his income for that year in full and specifically claiming tax-exempt status with regard thereto on the ground of foreign residence established in 1946, by Petitioner;

(q) That on or about June 13, 1948, Petitioner left Afghanistan on vacation and returned to the United States where he remained for several months, during which time he did not seek or engage in any gainful occupation and at the end of which he re-

turned to duty in Afghanistan, pursuant to the terms of his renewal contract, above-mentioned; that he arrived in Afghanistan on or about the 6th day of February, 1949, and there continued his employment until October, 1949, at which time he again left Afghanistan to visit the United States, the purposes of the latter trip being partly in the nature of a vacation and partly for the purposes of conferences with Stateside officials of his employer corporation, relative to past and future operations in Afghanistan, in so far as they relate to the employment of Petitioner in Afghanistan; that at the conclusion of his vacation and the conferences above-mentioned, Petitioner intends to return to Afghanistan and resume his foreign residence and the obligations of his employment contract in pursuance of his career in the field of earth-dam construction in foreign countries;

(r) That based upon the facts hereinabove set forth Petitioner is advised and believes and asserts the fact to be that at all times during the entire taxable calendar year, 1947, he was and now is a bona fide resident of Kandahar, Afghanistan; and that his entire income earned in that country in that year is exempt from taxation and that he owes no tax to the Government of the United States by reason of said earnings.

Wherefore, Petitioner Prays That this petition will be heard by the Tax Court of the United States at Boise, Idaho, or at some other nearby city, at an early date convenient to Petitioner and to the Court;

that at said hearing a Judgment may be entered herein finding that Petitioner was, during the entire year, 1947, a bona fide resident of Kandahar, Afghanistan; that the earnings of Petitioner in Afghanistan during the year 1947, are exempt from taxation; that the determination of the Commissioner to the contrary is unlawful and void and that the Petitioner be given and granted such other and further relief as to the Court may seem meet and just.

/s/ GILBERT WADDELL,
Petitioner.

Verification

State of California,
County of Alameda—ss.

Gilbert Waddell, being first duly sworn, upon oath deposes and says:

That he is the Petitioner named in the within and foregoing Petition; that he has read the same, knows the contents thereof and believes the facts therein stated to be true.

/s/ GEORGE WADDELL.

Subscribed and sworn to before me this 18th day of November, 1949.

[Seal] /s/ H. A. JOHNSON,
Notary Public.

EXHIBIT A

Treasury Department, Internal Revenue Service

Boise, Idaho

Account No. 8153113

March 4, 1949

In replying refer to: IT:AGC:IB

Gilbert Waddell

c/o Morrison Knudsen Afghanistan Inc.

Kabaul, Afghanistan

You are advised that the determination of your income tax liability for the taxable year 1947 discloses a deficiency of \$2,362.65 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 150 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 150 day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Collector of Internal Revenue, Boise, Idaho, for the attention of the Audit Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the

accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

COMMISSIONER

By JOHN R. VILEY,

Collector.

Enclosures: Statement, Form of Waiver.

Explanation of Deficiency on Return

No. 8153113

Gilbert Waddell

c/o Morrison Knudsen Afghanistan Inc.

Kabaul, Afghanistan

On January 28, 1949, you were notified of an apparent deficiency in your income tax return for the year 1947 as follows:

From the information submitted by you it appears that you do not qualify to claim the benefits of the Internal Revenue Code Section 116A.

The tax on \$11,050.00 adjusted gross income is \$2,362.65.

Received and Filed T.C.U.S. Nov. 25, 1949.

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein admits and denies as follows:

1. Admits that petitioner is an individual and that the return for the period here involved was filed with the Collector of the District of Idaho. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in paragraph I of the amended petition.

2. Admits the allegations contained in paragraph II of the amended petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1947 and in the amount of \$2,362.65. Denies the remaining allegations contained in paragraph III of the amended petition.

4. Denies that he erred in his determination of the deficiency as shown by the notice of deficiency from which petitioner's appeal is taken. Specifically denies that he erred in the manner and form alleged in paragraph IV of the amended petition.

5 (a) to (r) inclusive. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V (a) to (r) inclusive of the amended petition.

6. Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of deficiency be approved.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

WILFORD H. PAYNE,
Division Counsel.

JOHN H. PIGG,
Special Attorney,
Bureau of Internal Revenue.

Received and Filed T.C.U.S. Jan. 10, 1950.

The Tax Court of the United States

MINUTES OF PROCEEDINGS

Date: October 26, 1950. Place: Portland, Ore.
Docket No. 24483.

Proceeding: Gilbert Waddell.

Assigned to: Judge Van Fossan, Division No. 9.

Counsel: For Petitioner: James F. Butler, Esq.,
400 Continental Bldg., Boise, Idaho. For Respondent: John D. Picco.

Stenographic Reporter: Clark. Hearing: 9:40-10:20 a.m. Sub. Transcript ordered: Yes.

On the merits: Yes.

Filed at hearing: Stipulation of Facts with Exhibits 1-A through 4-D attached.

Petitioner's brief: Dec. 26, 1950. Reply: Feb. 26, 1951.

Respondent's brief: Feb. 9, 1951.

Witnesses for Petitioner: Helene Burda.

Exhibits: Respondent's E. Income Tax Return—1947.

/s/ MARY Y. ROBERTS,
Acting Deputy Clerk.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys of record that the following facts are true and that the same may be so considered and accepted by the Court as offered in evidence by the parties to this proceeding: Provided however, that the stipulation shall be without prejudice to the right of either of said parties to introduce other and further evidence not inconsistent with the facts herein stipulated:

1. Petitioner is an individual citizen of the United States who timely filed his Federal income tax return for the year 1947 with the Collector for the District of Idaho at Boise, Idaho. Petitioner is on a cash receipts and disbursements basis, and files his income tax returns on a calendar year basis. The income tax return for the year 1947 may be offered

in evidence by respondent without objection and without further identification. The tax year in issue is the calendar year ending December 31, 1947.

2. Petitioner and Mable Waddell, his wife, were married in 1919 and divorced in 1946. As the issue of this marriage, there were born three daughters, all living. At the time of the divorce the two older daughters were and still are married and living with their respective husbands. The younger daughter, Joanne Waddell, was then and still is a minor, whose care and custody were by the divorce decree awarded to petitioner. The minor daughter resides with her married sister, Mrs. T. A. Burda, at 421 8th Street, Huntington Beach, California. Petitioner provides for and finances her upkeep and schooling. Petitioner has been a single man since the entry of the divorce decree on February 22, 1946.

3. Petitioner was born in Kansas in 1897, and prior to May 1946 made his residence in Irwin, Idaho. He was and is an engineer by occupation, and in 1921 accepted employment as an engineer with the Bureau of Reclamation, U. S. Department of Interior. Petitioner was continuously employed by the Bureau of Reclamation from 1921 until May 3, 1946, when he resigned to accept employment with Morrison-Knudsen Afghanistan, Inc., a Nevada corporation. In his letter of resignation, dated April 19, 1946, petitioner stated that he was resigning "in order to accept private employment with a company engaged in development of irrigation projects in foreign countries". Attached hereto and made a part hereof, as Exhibit 1, is a true and correct copy of said letter

of resignation. During his employment with the Bureau of Reclamation, petitioner had acquired a civil service P-3 rating and such retirement pension rights as provided by the governing laws and regulations.

4. Petitioner signed a contract of employment with Morrison-Knudsen Afghanistan, Inc., on May 9, 1946. Attached hereto and made a part hereof, as Exhibit 2, is a true and correct copy of said Employment Contract, dated May 9, 1946.

5. The Morrison-Knudsen Co., Inc., is a domestic corporation engaged in the construction business. This company established a foreign division composed of several subsidiary corporations prior to the end of the war for the purpose of contracting for and carrying on construction work in foreign countries. Morrison-Knudsen Afghanistan, Inc. is the subsidiary corporation which operates solely in the Kingdom of Afghanistan.

6. In 1946 Morrison-Knudsen Afghanistan, Inc., entered into a four-year contract with the Kingdom of Afghanistan whereby said corporation agreed to build certain roads and canals. A second four-year contract was executed by Morrison-Knudsen Afghanistan, Inc., and the Kingdom of Afghanistan in April of 1950, providing for the construction of certain storage dams.

7. Petitioner arrived in Afghanistan on June 13, 1946, and worked for two years, the period required by his contract. Petitioner left Afghanistan on June 13, 1948, and returned to the United States at company expense, arriving on June 20, 1948. He re-

mained in the United States for the remainder of the year. On January 22, 1949, he signed a second contract of employment with Morrison-Knudsen Afghanistan, Inc. Attached hereto and made a part hereof, as Exhibit 3, is the original copy of said Employment Contract dated January 22, 1949. He left the United States on January 27, 1949, and arrived in Afghanistan on February 6, 1949. Petitioner worked until October of 1949, when the company terminated his contract pursuant to paragraph 4 thereof, because of an enforced reduction of personnel due to temporary curtailment of construction funds. Thereupon, petitioner returned to the United States, at company expense, arriving on October 28, 1949. Petitioner lived in the United States until approximately May 11, 1950, when he signed a third contract of employment with Morrison-Knudsen Afghanistan, Inc. This contract is substantially similar in its terms to the employment contracts dated May 9, 1946 (Exhibit 2), and January 22, 1949 (Exhibit 3). Petitioner departed for Afghanistan on May 11, 1950, and at the time of the trial of said proceeding was serving the company in Afghanistan pursuant to said contract of employment.

8. Petitioner's entire income during the calendar year 1947 was earned by him while employed in the Kingdom of Afghanistan, where he was physically present during the whole of said year.

9. At all times while employed in Afghanistan, petitioner lived in quarters furnished by the company, namely, in a brick building built by the com-

pany and maintained for its employees, where he received his board and lodging free of cost. Petitioner **was free to obtain outside board and lodging, but he did not**, because had he done so he would have had to pay for same out of his own pocket, moreover the board and lodging so purchased would have been inferior. While thus employed in Afghanistan, petitioner maintained no home, residence building or apartment in the United States. Petitioner did not participate in local politics nor did he engage in trade. Petitioner did not pay any taxes to the Afghan authorities, and no tax was ever levied upon him by the Kingdom of Afghanistan, nor did the company pay any taxes on his behalf.

10. While in the United States from June 20, 1948, to January 22, 1949, petitioner visited friends and took care of his personal affairs at Boise, Idaho, and elsewhere, and stayed at the homes of his married daughters and of his sister in California, Idaho and Nevada. He stayed with them for approximately three and one-half months, and for almost two and one-half months he lived in a rented apartment in Berkeley, California. While in the United States from October 28, 1949, to May 11, 1950, petitioner lived approximately one month at the homes of his married daughters and approximately six months in a rented apartment in Berkeley, California. Petitioner was not under any contractual obligation to the company or any other employer, while in the United States during the years 1947 to 1949, inclusive, and received no compensation from any em-

ployer for work done in the United States or elsewhere.

11. Petitioner applied for a passport on April 13, 1946, prior to his departure for Afghanistan. At that time he stated that he was domiciled in the United States, and that his permanent residence was 316 Broadway, Boise, Idaho, which is the address of the general business offices of Morrison-Knudsen Co., Inc. On June 24, 1947, petitioner went to the American Consulate in Kabul, Afghanistan, and made application for registration. In this application he stated that his legal residence in the United States was Boise, Idaho, and he further stated that "I intend to return to the United States within one year to reside permanently." On May 26, 1948, he applied for an extension of his passport. On April 26, 1950, he applied for a passport, and one was issued on April 27, 1950. At that time he stated that his permanent residence was 421 8th Street, Huntington Beach, California, which is the address of T. A. Burda, petitioner's son-in-law. Petitioner does not own or have any financial interest in 421 8th Street, Huntington Beach, California, and has never resided there except as a guest of his son-in-law and daughter. Attached hereto and made a part hereof, as Exhibit A, are duly certified copies of applications by petitioner for passport, for passport renewals and for registration in Afghanistan.

12. Subject to the approval and consent of the Court, either of the parties hereto may withdraw any or all of the exhibits attached hereto, or as may be otherwise received in evidence at this proceeding,

for the purpose of preparing and substituting in their stead photostat copies thereof.

/s/ JAMES F. BUTLER,
Attorney for Petitioner.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

EXHIBIT No. 1

Idaho Falls, Idaho, April 19, 1946

Commissioner, Washington, D. C.

Chief Engineer, Denver

Regional Director, Boise

Through Project Engineer, Idaho Falls, Idaho
Gentlemen:

In order to accept private employment with a company engaged in development of irrigation projects in foreign countries, I hereby submit my resignation from the War Service Indefinite Appointment as Engineer P-3, assigned to duties on the Palisades Project, Idaho Falls, Idaho, effective as of close of business May 3, 1946.

My forwarding address will be: c/o Mr. Chas. Elliott, 2905-6 Chanin Bldg., 124 E. 42 St., New York, N. Y. (To be forwarded to Morrison-Knudsen Co., Afghanistan.)

Very truly yours,

/s/ GILBERT WADDELL

[Stamped]: Received May 13, 11:54 a.m., '46.
Bureau of Reclamation, Washington, D. C.

EXHIBIT No. 2

Morrison-Knudsen Afghanistan, Inc.

SUPERVISORY EMPLOYMENT CONTRACT

Name of Employee: Gilbert Waddell.

Position: Field Engineer.

Social Security Number: 519-20-7340.

This Agreement made and entered into this 9th day of May, 1946, by and between Morrison-Knudsen Afghanistan, Inc., a Nevada corporation, hereinafter called "Employer," and Gilbert Waddell of Boise, Idaho, hereinafter called "Employee."

Witnesseth:

Whereas, Employer is engaged in the performance of a construction contract in the Kingdom of Afghanistan and desires to retain the services of Employee for work in connection with said construction contract.

Now, Therefore, in consideration of the premises and the mutual covenants, agreements and conditions hereinafter contained, the parties do hereby agree as follows:

1. Employment Subject to Construction Contract

Employer employs Employees for certain services in the construction work to be performed by Employer under said construction contract and said employment is in all respects subject to the provisions of said construction contract and the reasonable requirements and interpretations thereof.

2. Place of Employment

The services of Employee shall be performed in

Exhibit No. 2—(Continued)

Afghanistan at any one or more of the places therein which may be designated by Employer, or, at Employer's option, at such other place or places outside said country which Employer may designate in connection with the performance of said construction contract.

3. Position

The position for which Employee represents he is qualified and for which he is employed is that of Field Engineer.

If Employee is used in any equivalent or lower classification than that for which he is hired to which he may hereafter be assigned by Employer he will perform work in such classification to the best of his ability at the salary specified in Paragraph 5 hereof. Employer may, however, reclassify Employee to higher pay rate classification, but no payment of salary or wages will be made at such higher rate until, in the opinion of the Employer, the Employee has demonstrated his ability to perform the duties of the higher classification. At any time thereafter, Employer may terminate such reclassification and return Employee to his original classification or equivalent thereof, whereupon Employee shall be returned to his original rate of pay.

4. Period of Employment

The period of services provided for by this Contract shall be twenty-four (24) months at the site of the work after Employee's arrival at such site, provided that in the event Employer's construction

Exhibit No. 2—(Continued)

contract is completed or terminated before the expiration of said period, this Contract shall thereupon terminate, and Employer shall only be obligated to pay Employee for services rendered to the date of such termination or completion and salary during the return trip to the United States as provided in Paragraph 6 and return travel expenses as provided in Paragraph 8.

5. Salary Rate: Vacation

Employee shall receive for services performed hereunder the sum of \$850.00 dollars per month lawful money of the United States of America which shall be the whole salary and compensation agreed upon, except as hereinafter provided, for the entire period of service, and payment to and acceptance thereof by Employee shall operate as a full release to Employer. Employee agrees to devote his full time, attention, skill and ability to the performance of the duties of the position for which he is hired or to which he may be reassigned as provided in Paragraph 3 hereof and shall work as many hours per day and days per week as shall be necessary to perform such duties to the satisfaction of Employer.

After Employee has worked at his designated place of employment for a period of twelve (12) full months, he shall be entitled to vacations with pay, or pay in lieu of vacations, in accordance with the following provisions:

(1) The total vacation shall be for a period of thirty (30) days.

Exhibit No. 2—(Continued)

(2) The time for starting a vacation shall be determined and established by Employer; provided, however, that if Employer delays the starting of vacation after the expiration of twelve months' employment on the job site, the period of delay shall be included in determining the remaining period of service at the job site which would entitle Employee to vacations for his second year of service.

(3) Such vacations shall be with pay at Employee's base rate of pay, excluding board and lodging, or any allowance in lieu thereof, as of the time the vacation is started.

(4) In the event that Employee elects, subject to consent of Employer, not to take a vacation and continue working, he shall be entitled to receive in lieu of said vacation one month's salary, which salary shall be his base rate of pay, excluding board and lodging, or any allowance in lieu thereof, at the time he foregoes taking vacation. Said month's salary in lieu of vacation shall be paid to Employee at the time he makes his election to forego taking a vacation.

(5) In the event this contract is not renewed at the expiration of the period of employment provided herein, Employee shall be paid one month's salary at his base rate of pay, upon his return to the United States, in lieu of earned vacation.

6. Date of Commencement of Salary

Salary shall commence four days prior to the date on which Employee has been advised to report at point of leaving the continental limits of the United

Exhibit No. 2—(Continued)

States enroute to the site of the work. Except as provided in Paragraph 10 herein, salary shall continue for four days after Employee returns to the continental limits of the United States, but in no case shall this additional number of days exceed a total of five days excluding the day of the Employee's arrival within the continental limits of the United States.

7. Transportation and Travel Allowance

Transportation from Boise, Idaho (point of hire) to Kabul, Afghanistan (site of work) shall be paid by Employer. Employer shall select the mode of transportation, provided Employee shall not be required to travel by plane without his consent and provided, further, that transportation shall be at least tourist class.

From the date that Employee leaves his point of hire enroute to the site of work, and until he shall arrive at the site of work, Employer shall pay Employee's expenses on a per diem basis at rate of \$5.00 per day; provided, however, that if the mode of transportation selected by the Employer shall include meals, at no cost to Employee, or if Employer shall elect to furnish meals to Employee while enroute, without expense to Employee, the per diem allowance herein provided for shall not be paid to Employee.

The per diem allowance herein provided for shall represent the full extent of Employer's liability for expenses incurred by Employee while enroute to job site, except for the following items of expense: hotel

Exhibit No. 2—(Continued)

bills for room only, costs incidental to securing passport and visas, cost of passport photographs; cost of medical examination, inoculations, vaccinations, and finger printing or other means of identification required by Employer.

Employee shall pay the foregoing excepted items of expense at the time they are incurred and shall obtain receipts therefor; Employee shall submit to Employer an itemized account covering these exempted items, and Employer shall reimburse Employee therefor when the same are presented.

8. Return Travel Expense

If Employee completes this contract in accordance with the terms hereof and said contract is not terminated by Employer under the provisions of Paragraph 10 hereof, he shall be returned from job site to the point of hire at Employer's expense. Employer shall select the mode of transportation. Per diem allowance and the additional items of expense allowable under the terms of Paragraph 7 for the trip to the site of the work shall be allowed for the return trip and shall be paid by Employer as provided in Paragraph 7 hereof.

9. Workmen's Compensation Insurance

Employer will provide by insurance or otherwise for securing payment of compensation and other benefits to Employee or his dependents under the provisions of the Workmen's Compensation Act of the State where Employee is hired.

Exhibit No. 2—(Continued)

10. Termination of Contract

If the services of Employee are not satisfactory to Employer or if he is not qualified for the position for which he is hired, or is negligent in his duties, or displays bad temper, or is or becomes addicted to the use of alcoholic drinks or drugs, or is insubordinate, or contracts venereal disease, Employee may be discharged by Employer and this contract shall terminate forthwith. In such case his employment and salary shall thereupon cease and he shall forfeit his right to payment of salary and expense allowance on the return trip to the United States. If Employee shall be discharged for one or more of the foregoing reasons, and if the laws or decrees of the country in which Employee shall be rendering services hereunder require Employer to return Employee to the United States, Employee agrees to reimburse Employer for any and all expenses incidental to said return, including cost of return transportation, which Employer may be required to pay. Employee hereby authorizes Employer to retain any and all salary or money withheld in accordance with Paragraph 14, or so much thereof as may be required, to reimburse Employer for such expenses.

It is agreed that Employer may discharge Employee if requested to do so by the Ministry of Public Works of the Kingdom of Afghanistan or his duly authorized representative and such discharge shall not constitute a breach of this Contract by Employer. Employee shall be paid salary earned to the date of such discharge and shall return to the United States

Exhibit No. 2—(Continued)

forthwith and in the discretion of Employer shall receive salary and travel expense on the return trip in the manner and for the periods specified in Paragraph 8.

11. Passport Requirements: Physical Examination

It is a condition of this Contract that Employee shall obtain a draft deferment if he is subject to the provisions of the United States Selective Service Act, and shall be able to and shall obtain a passport and all other documents or permits required for departure from the United States and travel to and entry into the country where he is to be employed. Employees shall pass a medical examination by a physician selected by Employer and shall obtain such vaccinations or inoculations as shall be required by Employer.

12. Board and Lodging

Employer agrees to furnish Employee with board and lodging during the term of this contract, or cash allowance in lieu thereof at Employer's option.

13. Salary Payment

Salary shall be paid once a calendar month and within a reasonable time following the end of the month in which such salary shall be earned. Employee hereby authorizes and directs the Employer to distribute his salary as follows: \$50.00 in Afghanis and balance to First Security Bank of Idaho, Idaho Falls, Idaho.

If Employee elects to receive payment of a portion of his salary in Afghanistan such amount shall

Exhibit No. 2—(Continued)

be paid to him in Afghanis at the official rate of exchange.

14. Withholding from Salary

Employee agrees that Employer shall withhold from the salary of Employee an amount equal to the transportation costs referred to in Paragraph 8. However, not more than one-third of Employee's earnings for any month shall be so withheld. The amount thus withheld shall be refunded to Employee upon completion of this Contract. If Employee quits or is discharged for any of the reasons specified in Paragraph 10 hereof, the amount withheld shall be applied by Employer against the costs which Employer may incur in returning Employee to United States and the balance remaining, if any, shall be refunded to Employee.

15. Income or Other Taxes

Employer will pay and not recharge to Employee income or any other taxes imposed by any country on salary earned by Employee under this Contract, other than taxes imposed by United States of America or any state thereof.

16. Extent of Agreement

This Contract embodies the whole agreement between the parties hereto and there are no inducements, provisos, terms, conditions or obligations made or entered into by Employer other than contained herein. No modification of this agreement shall be made except by instrument in writing signed by Employee and Employer's duly authorized representative.

Exhibit No. 2—(Continued)

17. Employee to Observe Afghan Laws

The Employee shall respect and obey all Afghan laws, rules and regulations and shall never interfere with the Afghan political or religious affairs either directly or indirectly, and he shall not engage in trade.

18. Notice in Event of Accident

In the event of serious accident, illness or other emergency affecting Employee, Employer shall notify Mrs. J. D. Gillies at Ruth, Nevada. This address may be considered as Employee's permanent address, or the address of the person with whom Employer may communicate concerning personal matters relating to Employee.

In Witness Whereof, Employer and Employee have executed this agreement the day and year first hereinabove written.

MORRISON-KNUDSEN AFGHAN-
ISTAN, INC.,

By C. E. ELLIOTT,
Manager, New York Office.

.....
Employee

Witness:

Passport applied for: April 13, 1946, Washington,
D. C. Salary to commence: May 9, 1946.

EXHIBIT No. 3

Morrison-Knudsen Afghanistan, Inc.

SUPERVISORY EMPLOYMENT CONTRACT

Name of Employee: Gilbert Waddell.

Position: Construction Engineer.

Society Security Number: 519-20-7340.

This Agreement made and entered into this 27th day of January, 1949, by and between Morrison-Knudsen Afghanistan, Inc., a Nevada corporation, hereinafter called "Employer," and Gilbert Waddell of Huntington Beach, California, hereinafter called "Employee."

Witnesseth:

Whereas, Employer is engaged in the performance of a construction contract in the Kingdom of Afghanistan and desires to retain the services of Employee for work in connection with said construction contract.

Now, Therefore, in consideration of the premises and the mutual covenants, agreements and conditions hereinafter contained, the parties do hereby agree as follows:

1. Employment Subject to Construction Contract

Employer employs Employee for certain services in the construction work to be performed by Employer under said construction contract and said employment is in all respects subject to the provisions of said construction contract and the reasonable requirements and interpretations thereof.

Exhibit No. 3—(Continued)

2. Place of Employment

The services of Employee shall be performed in Afghanistan at any one or more of the places therein which may be designated by Employer, or, at Employer's option, at such other place or places outside said country which Employer may designate in connection with the performance of said construction contract.

3. Position

The position for which Employee represents he is qualified and for which he is employed is that of Construction Engineer.

If Employee is used in any equivalent or lower classification than that for which he is hired to which he may hereafter be assigned by Employer he will perform work in such classification to the best of his ability at the salary specified in Paragraph 5 hereof. Employer may, however, reclassify Employee to higher pay rate classification, but no payment of salary or wages will be made at such higher rate until, in the opinion of the Employer, the Employee has demonstrated his ability to perform the duties of the higher classification. At any time thereafter, Employer may terminate such reclassification and return Employee to his original classification or equivalent thereof, whereupon Employee shall be returned to his original rate of pay.

4. Period of Employment

The period of services provided for by this Contract shall be twenty-four (24) months at the site of

Exhibit No. 3—(Continued)

the work after Employee's arrival at such site, provided that in the event Employer's construction contract is completed or terminated before the expiration of said period, this Contract shall thereupon terminate, and Employer shall only be obligated to pay Employee for services rendered to the date of such termination or completion and salary during the return trip to the United States as provided in Paragraph 6 and return travel expenses as provided in Paragraph 8.

5. Salary Rate: Vacation

Employee shall receive for services performed hereunder the sum of \$750.00 dollars per month lawful money of the United States of America which shall be the whole salary and compensation agreed upon, except as hereinafter provided, for the entire period of service, and payment to and acceptance thereof by Employee shall operate as a full release to Employer. Employee agrees to devote his full time, attention, skill and ability to the performance of the duties of the position for which he is hired or to which he may be reassigned as provided in Paragraph 3 hereof and shall work as many hours per day and days per week as shall be necessary to perform such duties to the satisfaction of Employer.

After Employee has worked at his designated place of employment for a period of twelve (12) full months, he shall be entitled to vacations with pay, or pay in lieu of vacations, in accordance with the following provisions:

Exhibit No. 3—(Continued)

(1) The total vacation shall be for a period of thirty (30) days.

(2) The time for starting a vacation shall be determined and established by Employer; provided, however, that if Employer delays the starting of vacation after the expiration of twelve months' employment on the job site, the period of delay shall be included in determining the remaining period of service at the job site which would entitle Employee to vacations for his second year of service.

(3) Such vacations shall be with pay at Employee's base rate of pay, excluding board and lodging, or any allowance in lieu thereof, as of the time the vacation is started.

(4) In the event that Employee elects, subject to consent of Employer, not to take a vacation and continue working, he shall be entitled to receive in lieu of said vacation one month's salary, which salary shall be his base rate of pay, excluding board and lodging, or any allowance in lieu thereof, at the time he foregoes taking vacation. Said month's salary in lieu of vacation shall be paid to Employee at the time he makes his election to forego taking a vacation.

(5) In the event this contract is not renewed at the expiration of the period of employment provided herein, Employee shall be paid one month's salary at his base rate of pay, upon his return to the United States, in lieu of earned vacation.

6. Date of Commencement of Salary

Salary shall commence one day prior to the date

Exhibit No. 3—(Continued)

on which Employee has been advised to report at point of leaving the continental limits of the United States enroute to the site of the work. Except as provided in Paragraph 10 herein, salary shall continue for five days after Employee returns to the continental limits of the United States, but in no case shall this additional number of days exceed a total of five days excluding the day of the Employee's arrival within the continental limits of the United States.

7. Transportation and Travel Allowance

Transportation from San Francisco, Calif. (point of hire) to Afghanistan (site of work) shall be paid by Employer. Employer shall select the mode of transportation, provided Employee shall not be required to travel by plane without his consent and provided, further, that transportation shall be at least tourist class.

From the date that Employee leaves his point of hire enroute to the site of work, and until he shall arrive at the site of work, Employer shall pay Employee's expenses on a per diem basis at rate of \$5.00 per day; provided, however, that if the mode of transportation selected by the Employer shall include meals, at no cost to Employee, or if Employer shall elect to furnish meals to Employee while enroute, without expense to Employee, the per diem allowance herein provided for shall not be paid to Employee.

The per diem allowance herein provided for shall

Exhibit No. 3—(Continued)

represent the full extent of Employer's liability for expenses incurred by Employee while enroute to job site, except for the following items of expense: hotel bills for room only, costs incidental to securing passport and visas, cost of passport photographs; cost of medical examination, inoculations, vaccinations, and finger printing or other means of identification required by Employer.

Employee shall pay the foregoing excepted items of expense at the time they are incurred and shall obtain receipts therefor; Employee shall submit to Employer an itemized account covering these exempted items, and Employer shall reimburse Employee therefor when the same are presented.

8. Return Travel Expense

If Employee completes this contract in accordance with the terms hereof and said contract is not terminated by Employer under the provisions of Paragraph 10 hereof, he shall be returned from job site to the point of hire at Employer's expense. Employer shall select the mode of transportation. Per diem allowance and the additional items of expense allowable under the terms of Paragraph 7 for the trip to the site of the work shall be allowed for the return trip and shall be paid by Employer as provided in Paragraph 7 hereof.

9. Workmen's Compensation Insurance

Employer will provide by insurance or otherwise for securing payment of compensation and other benefits to Employee or his dependents under the

Exhibit No. 3—(Continued)

provisions of the Workmen's Compensation Act of the State where Employee is hired.

10. Termination of Contract

If the services of Employee are not satisfactory to Employer or if he is not qualified for the position for which he is hired, or is negligent in his duties, or displays bad temper, or is or becomes addicted to the use of alcoholic drinks or drugs, or is insubordinate, or contracts venereal disease, Employee may be discharged by Employer and this contract shall terminate forthwith. In such case his employment and salary shall thereupon cease and he shall forfeit his right to payment of salary and expense allowance on the return trip to the United States. If Employee shall be discharged for one or more of the foregoing reasons, and if the laws or decrees of the country in which Employee shall be rendering services hereunder require Employer to return Employee to the United States, Employee agrees to reimburse Employer for any and all expenses incidental to said return, including cost of return transportation, which Employer may be required to pay. Employee hereby authorizes Employer to retain any and all salary or money withheld in accordance with Paragraph 14, or so much thereof as may be required, to reimburse Employer for such expenses.

It is agreed that Employer may discharge Employee if requested to do so by the Ministry of Public Works of the Kingdom of Afghanistan or his duly authorized representative and such discharge shall

Exhibit No. 3—(Continued)

not constitute a breach of this Contract by Employer. Employee shall be paid salary earned to the date of such discharge and shall return to the United States forthwith and in the discretion of Employer shall receive salary and travel expense on the return trip in the manner and for the periods specified in Paragraph 8.

11. Passport Requirements: Physical Examination

It is a condition of this Contract that Employee shall obtain a draft deferment if he is subject to the provisions of the United States Selective Service Act, and shall be able to and shall obtain a passport and all other documents or permits required for departure from the United States and travel to and entry into the country where he is to be employed. Employee shall pass a medical examination by a physician selected by Employer and shall obtain such vaccinations or inoculations as shall be required by Employer.

12. Board and Lodging

Employer agrees to furnish Employee with board and lodging during the term of this contract, or cash allowance in lieu thereof at Employer's option.

13. Salary Payment

Salary shall be paid once a calendar month and within a reasonable time following the end of the month in which such salary shall be earned. Employee hereby authorizes and directs the Employer to distribute his salary as follows: As per salary allotment agreement.

Exhibit No. 3—(Continued)

If Employee elects to receive payment of a portion of his salary in Afghanistan such amount shall be paid to him in Afghanistan at the official rate of exchange.

14. Withholding from Salary

Employee agrees that Employer shall withhold from the salary of Employee an amount equal to the transportation costs referred to in Paragraph 8. However, not more than one-third of Employee's earnings for any month shall be so withheld. The amount thus withheld shall be refunded to Employee upon completion of this Contract. If Employee quits or is discharged for any of the reasons specified in Paragraph 10 hereof, the amount withheld shall be applied by Employer against the costs which Employer may incur in returning Employee to United States and the balance remaining, if any, shall be refunded to Employee.

15. Income or Other Taxes

Employer will pay and not recharge to Employee income or any other taxes imposed by any country on salary earned by Employee under this Contract, other than taxes imposed by United States of America or any state thereof.

16. Extent of Agreement

This Contract embodies the whole agreement between the parties hereto and there are no inducements, provisos, terms, conditions or obligations made or entered into by Employer other than contained herein. No modification of this agreement

Exhibit No. 3—(Continued)

shall be made except by instrument in writing signed by Employee and Employer's duly authorized representative.

17. Employee to Observe Afghan Laws

The Employee shall respect and obey all Afghan laws, rules and regulations and shall never interfere with the Afghan political or religious affairs either directly or indirectly, and he shall not engage in trade.

18. Notice in Event of Accident.

In the event of serious accident, illness or other emergency affecting Employee, Employer shall notify: T. A. Burda at 421 8th Street, Huntington Beach, California. This address may be considered as Employee's permanent address, or the address of the person with whom Employer may communicate concerning personal matters relating to Employee.

In Witness Whereof, Employer and Employee have executed this agreement the day and year first hereinabove written.

MORRISON-KNUDSEN AFGHAN-
ISTAN, INC.,

By S. H. SCHENCK,

GILBERT WADDELL,
Employee.

Witness:

ERIC G. MADSEN

MAXINE APPLEWHITE

Passport applied for: Passport Received. Salary to commence January 22, 1949.

EXHIBIT A

No. 4629

United States of America

Department of State

To all to whom these presents shall come, Greeting:

I Certify That the documents hereunto annexed are true copies from the files of this Department.

In testimony whereof, I, Dean Acheson, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this fourth day of August, 1950.

[Seal] /s/ DEAN ACHESON,
Secretary of State

/s/ By M. P. CHAUVIN,
Authentication Officer,
Department of State.

EXHIBIT A-2

DEPARTMENT OF STATE
PASSPORT APPLICATION

FORM FOR NATIVE CITIZEN

(Version of 1947)

Enclose and attach PART TWO if members of family are to be included in passport

No. **100438**
SAN FRANCISCO SERIES
AUTH. BY TELEGRAM OF
APR 27 1950
ISSUED **APR 27 1950**

UNITED STATES OF AMERICA
STATE OF California
COUNTY OF San Francisco

I, Gilbert Waddell
(Name in full)
hereby apply to the Department of State, at Washington, for a passport. I solemnly swear that I was born at
Emporia (Town or city) Kansas (State or country) on June 27 1897 (Date)

I am domiciled in the United States, my permanent residence being at 421 - 87th Street
Huntington Beach (Town or city) State of California (State)

I have resided outside the United States as follows:
(State name of, and period of residence in, each foreign country)
Afghanistan from May 1946 to June 1948
4 (Number of countries) from Jan. 1949 to Oct. 1949

My father, O.P. Waddell (Name) was born at Not known
on or about _____, and is now residing at Deceased
(The following portion in this block to be filled in only by a person whose father was not born in the United States)
My father emigrated to the United States on or about _____ (Month) 1 (Year), resided
years continuously in the United States from 1 _____ to 1 _____, and was naturalized as a citizen of the United
States before the _____ Court of _____
at _____ (City) _____ (State) on _____ (Month and day) 1 (Year)

My mother, Helenetta Waddell (Name) was born at Not known
on or about _____, and is now residing at Deceased
(The following portion in this block to be filled in only by a person whose mother did not born in the United States)
My mother emigrated to the United States on or about _____ (Month) 1 (Year), resided
years continuously in the United States from 1 _____ to _____ She acquired citizenship in the United States
by _____

DESCRIPTION OF APPLICANT

Height 6 feet, 1 1/2 inches.

Hair Brown

Eyes Blue

Distinguishing marks or features None
(Note any marks or scars on hands or face by which applicant may be identified)

Place of Birth Emporia Kansas
(City and State)

Date of birth June 27, 1897
(Month, day, and year)

Occupation Civil Engineer

MAILING ADDRESS
(Print complete address plainly)

Gilbert Waddell
660 Market, Room 40
San Francisco 4, Calif.

(Do not use this space)

PASSPORT FEE REC'D.
MAY - 9 1950
215726

My last American passport was obtained from Washington on May 2nd 1946
(Name Washington or location of issuing office) (Date)
and is submitted herewith for cancellation see cancelled & returned
(Using designated lines of passport for its return to government)

130
WADDELL, GILBERT
(To be printed in full by applicant for passport)
(Print name)
(Middle name)

My last passport was obtained from None on _____ (Name, Washington or location of office abroad) _____ (Date)

and is submitted herewith for cancellation _____ (Give disposition of passport if it cannot be submitted)

I intend to leave the United States from the port of New York City, N.Y. (Part of departure)
on about May 10, 1946, sailing on board the Do not know (Name of ship)

I intend to visit the following countries for the purposes indicated:

Afghanistan (Name of countries to be visited) Engineer on construction project (Purpose of visit)

and I intend to return to the United States within 3 _____ (months—years)

ADDRESS

I request that my passport be mailed to the following address:

(Note—A passport will not be mailed to a local address unless the holder is the applicant's place of permanent residence.)

Name Mrs. Gilbert Wassell
Morrison-Knudsen Company
Number and street 2905-6 Chanin Bldg.
124 E. 42nd St.
City and State New York, N.Y.

DESCRIPTION AND PHOTOGRAPH

Height 6 feet, 1½ inches.

Hair Brown

Eyes Blue

Distinguishing marks or features None (Note any marks or scars on hands or face)

by which applicant may be identified)

Place of birth Emporia, Kansas (City and State)

Date of birth June 27, 1897 (Month, day, and year)

Occupation Engineer



I solemnly swear that the statements made on both sides of this application are true and that the photograph attached hereto is a likeness of me.

I have not been naturalized as a citizen of a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered or served in the armed forces of a foreign state; accepted or performed the duties of any office, post or employment under the government of a foreign state or political subdivision thereof; voted in a political election in a foreign state or participated in an election or plebiscite to determine the sovereignty over foreign territory; made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state; been convicted by court martial of deserting the military or naval service of the United States in time of war; been convicted by court martial, or by a court of competent jurisdiction, of committing any act of treason against, or of attempting by force to overthrow, or of bearing arms against, the United States.

OATH OF ALLEGIANCE

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation, or purpose of evasion. So help me God.

Subscribed and sworn to before me this 13th day of April, 1946

(SEAL OF COURT) Ed. M. Bryan

Clerk of the U. S. District Court at Boise, Idaho

AFFIDAVIT OF IDENTIFYING WITNESS By Lone Manner Deputy.

I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below my signature hereto affixed; that I know the applicant who executed the affidavit hereinbefore set forth to be a citizen of the United States; that the statements made in the applicant's affidavit are true to the best of my knowledge and belief; further, I solemnly swear that I have known the applicant personally for 38 years.

If witness has been issued a passport, give number if known and date of approximate date of issue.

No. None Date of issue _____

No lawyer or other person will be accepted as witness to a passport application if he has received or expects to receive a fee for his services in connection with the execution of the application or obtaining the passport.

Subscribed and sworn to before me this 13th day of April, 1946

(SEAL OF COURT) Ed. M. Bryan

Clerk of the U.S. District Court at Boise, Idaho

NOTE.—If applicant was born outside the United States on or after May 24, 1934, of an alien father and an American mother, a supplemental affidavit will be required giving the name and date and place of birth of mother as well as complete date concerning how and on what date she acquired American citizenship.

By Lone Manner Deputy.

EXHIBIT - A - 4

PASSPORT APPLICATION

6722

FORM FOR NATIVE CITIZEN

(Domestic use only)

Read and attach PART TWO if member of family not to be included in passport

PASSPORT
ISSUED
MAY 2 - 1946
DEPARTMENT OF STATE

UNITED STATES OF AMERICA

STATE OF Idaho

COUNTY OF Ada

I, Gilbert Waddell

(Name in full)

do hereby apply to the Department of State, at Washington, for a passport. I solemnly swear that I was born at Esperia Kansas on June 27, 1897

I am domiciled in the United States, my present residence being at 316 Broadway Boise Idaho

I have resided outside the United States as follows:

(Specify country, and period of residence in, each foreign country)

Territory of Hawaii from Sep. 1942 to March, 1943

from _____ to _____

My father, O. F. Waddell

(Name)

was born at Kentucky

on Do not know, and is now deceased

(The following portion in this block to be filled in only by a person whose father was not born in the United States)

My father emigrated to the United States on or about _____

(Month)

(Year)

resided _____

years continuously in the United States from _____ to _____, and was naturalized as a citizen of the United

States before the _____ Court of _____

at _____ on _____

(City)

(Date)

My mother, Henrietta Gilbert Waddell

(Name)

was born at Kentucky

on Do not know, and is now deceased

(The following portion in this block to be filled in only by a person whose mother was not born in the United States)

My mother emigrated to the United States on or about _____

years continuously in the United States from _____ to _____

by _____

A WOMAN APPLICANT MUST FILL IN THIS PORTION

I was never married.

(Last married on _____)

who was born at _____

and who is now residing at _____

Our marriage (has not been terminated)

(was terminated by (Month) (Divorce) on _____)

My maiden name was _____

I was previously married.

(was previously married to _____)

on _____ at _____

(Date)

(City and State)

and the marriage was terminated by (Month) (Divorce) on _____

My present residence is _____

and my father _____

as shown by the Certificate of _____

THIS IS NOT A PASSPORT
THROUGH CARD

NECESSARY

FOR THE

TRAVEL

APR 1 1946

APR 1 1946

APR 1 1946

APR 1 1946

APR 1 1946

APR 1 1946





EXHIBIT A-6

APPLICATION FOR AMENDMENT OR EXTENSION OF

PASSPORT
CERTIFICATE OF
IDENTITY AND
REGISTRATION

Continued.

I request that my ^{passport}_{certificate of identity and registration} be—

(a) Extended for ~~-----~~ months until May 2, 1950

(b) Amended to exclude my (wife) (husband) _____

CERTIFICATE OF ACTION TAKEN

American Consular Service at Tebul, Afghanistan

I hereby certify that the above ^{passport}_{certificate of identity and registration} was on May 26th, 1948
(Date)

☐ Amended as requested.

☒ Extended ~~for~~ until May 2, 1950
(Insert length of period)

☐ Referred to the Department for consideration and decision.

Authority _____

(If specially authorized by letter, instruction, or telegram)

Documentary evidence submitted United States passport No. 65722 issued at Washington, D. C. on May 2nd, 1946
(Brief description)

[SEAL]
[NO FEE]

George E. Palmer
George E. Palmer
American Vice Consul
(Signature of American Consul)

INSTRUCTIONS

*In cases where specific authorization by the Department is required, a notation of the action taken, upon the receipt of a reply from the Department, should be transmitted to the Department on a third copy of this form.

U. S. GOVERNMENT PRINTING OFFICE 16-12843-1

XXXXXX

CERTIFICATE OF ACTION TAKEN

I HEREBY CERTIFY that the above passport was on May 26th, 1948
(Date)

(Date)

renewed for _____ months.

renewed for two years.

referred to the Department for consideration and decision together with a Form 21A.

taken up.

[SEAL]

George E. Palmer
(Signature)
George E. Palmer
American Vice Consul
(Title)

George E. Palmer
American Vice Consul

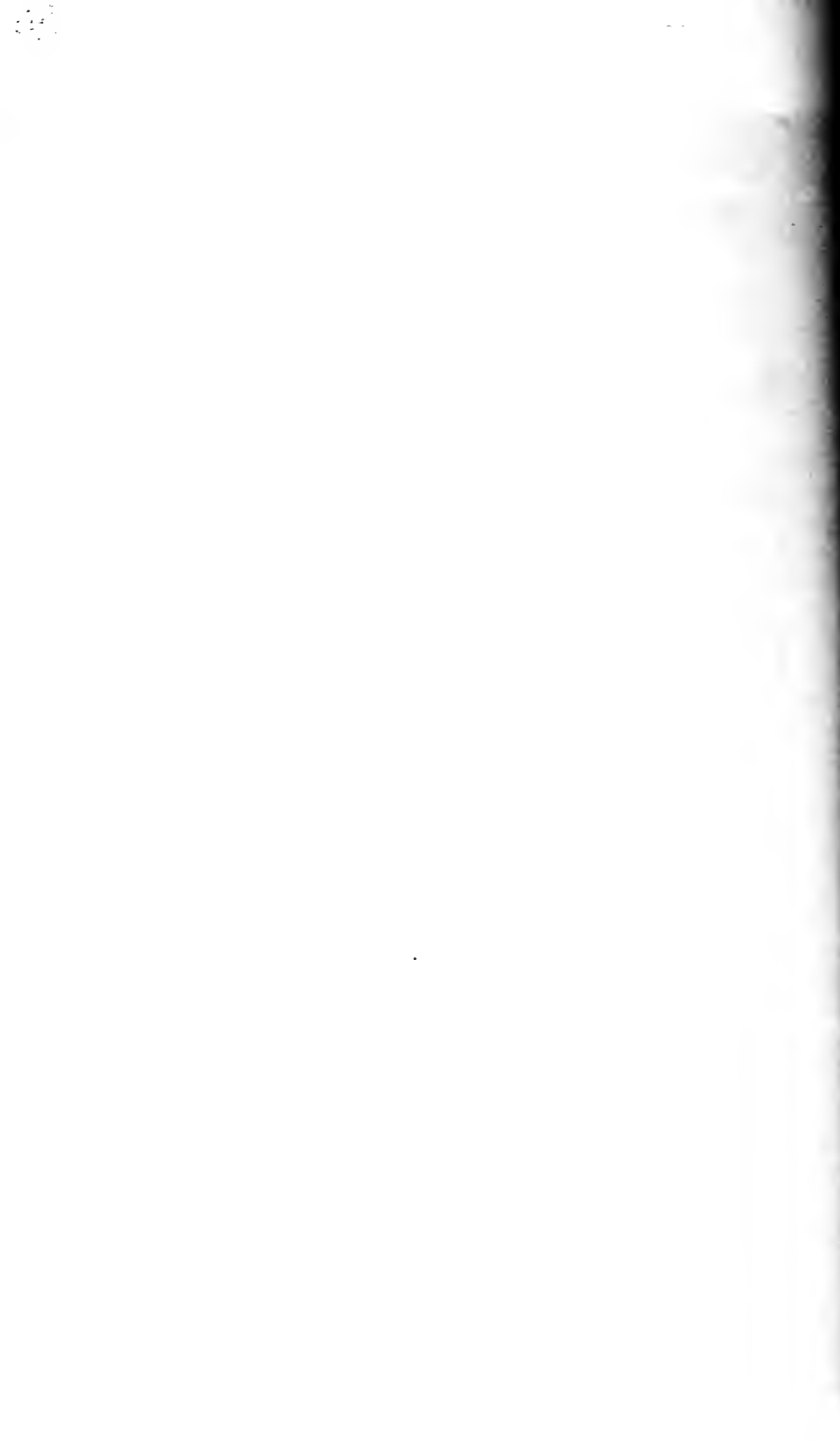


EXHIBIT A-7

FILE

Budget Bureau No. 47-2027.
Revised until changed.

REGISTRATION APPROVED

at June 24, 1947.
expires June 24, 1949
for Consul B.R. Crooks
at Kabul, Afghanistan

APPLICATION FOR REGISTRATION

(For use by persons whose status as a citizen has been approved by the Department of State at Washington)

Certificate of Identity and Registration Issued
Card of Identity and Registration Issued
Date
No.
Expires
Consul
Place

I, Gilbert Waddell, was born at Emporia, Kansas
(State) on 6-27-97; My father, Olus Waddell, was born at USA (city unknown)
(Date) My mother, Henrietta Gilbert, was born at USA (city unknown)
(Name)

as naturalized as a citizen of the United States before the Court of

on I have resided outside the United States since

Afghanistan, 1946
(Give names of countries and periods of residence in each)

the purpose of my legal residence

in United States is at Boise, Idaho; my occupation is that of

Field Engineer; I intend to return to the United States within

one year to reside permanently. I have not been naturalized as a citizen of a foreign state;
on an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered, or served in, the armed
forces of a foreign state; accepted, or performed the duties of, any office, post, or employment under the government of a foreign state
political subdivision thereof; voted in a political election in a foreign state or participated in an election or plebiscite to determine
sovereignty over foreign territory; made a formal renunciation of nationality before a diplomatic or consular officer of the United
States in a foreign state; been convicted by court martial of deserting the military or naval service of the United States in time of war,
or committing any act of treason against or of attempting by force to overthrow, or of bearing arms against the United States.
If any of the above mentioned acts or conditions are applicable to the applicant's case, a supplementary statement under oath
shall be attached and made a part hereof.

My husband—father—mother was naturalized as a citizen of the United States before the Court of

My wife, None, to whom I was married on

was born at

He is not an American citizen.
She (acquired American citizenship by

have the following minor children:

an Caroline Las Vegas, Nevada Sept. 10, 1954 Browns School for
(Name) (Place of birth) (Date of birth) Girls, Glendora,
Calif.

I desire my registration to include the following members of my family: None

In the event of death or accident notify:

S. Duncan Gillis (sister) Ruth, Nevada

Gilbert Waddell
Gilbert Waddell
Kandahar, Afghanistan
(Address)

denance of citizenship submitted: U. S. Passport No. 65722 (Serial No. None)
(To be filled in by Consul)

issued by Department of State, May 2, 1946

Bruce R. Crooks
Bruce R. Crooks, American Vice Consul
Kandahar, Afghanistan June 2, 1947
(Name) (Date)

FEE
10-2410-8





APPLICATION FOR AMENDMENT OR EXTENSION OF
(To be filled out in duplicate)*

PASSPORT
CERTIFICATE OF
IDENTITY AND
REGISTRATION

I, Gilbert Waddell

(Name)

request that my (Passport
Certificate of Identity and Registration

CERTIFICATE OF IDENTITY AND REGISTRATION IS A REQUIREMENT FOR THE UNITED STATES IN TIMES OF WAR, OR OF
state; been convicted by court martial of deserting the military or naval service of the United States in times of war, or of
committing any act of treason against or of attempting by force to overthrow, or of bearing arms against the United States.
If any of the above-mentioned acts or conditions are applicable to the applicant's case, or to the case of any other person
mentioned in this application, a supplementary statement under oath should be attached and made a part hereof.



Gilbert Waddell
(Signature of applicant)
Kabul, Afghanistan
(Foreign address)

American consular service at _____

I CERTIFY that the person to whom the above passport was issued
appeared before me in person and signed and swore to the above

application on the No day of _____, 19____

(Signature)

Witness.—To be sworn to at option of Consular Officer. (No fee if sworn to before
Consular Officer.)
Any person may be accepted by mail if they have been sworn to before a local
officer authorized to administer oaths for general purposes. In such a case the
foreign official should fill out, sign, and affix his seal to the form above.

16-17242-1

XXXXX
APPLICATION FOR AMENDMENT OR EXTENSION OF (PASSPORT
CERTIFICATE OF
IDENTITY AND
REGISTRATION) —Continued.

I request that my (passport
certificate of
identity and
registration) be—

(a) Extended for _____ months— until May 2, 1948.

(b) Amended to exclude my (wife) (husband) _____

CERTIFICATE OF ACTION TAKEN

American Consular Service at Kabul, Afghanistan

I hereby certify that the above (passport
certificate of
identity and
registration) was on April 28, 1947.
(Date)

☐ Amended as requested.

☒ Extended for— until May 2, 1948.

(Insert length of period)

☐ Referred to the Department for consideration and decision.

Authority _____
(If specially authorized by letter, instruction, or telegram)

Documentary evidence submitted PASSPORT.

(Brief description)

Bruce R. Crooks
BRUCE R. CROOKS
(Signature of American Consul)

American Vice Consul.

INSTRUCTIONS

*In cases where amendment or extension of the Department is required, a notation of the action taken, upon the receipt of a reply from the Department, should be transmitted to the Department on a third copy of this form.



FORM NO. 219
FOREIGN SERVICE
(Established May 1916—Rev. June 1945)

Passport No. 65722

Issued on May 2nd, 1946

At Washington.

APPLICATION FOR AMENDMENT OR EXTENSION OF
(To be filled out in duplicate)*PASSPORT
CERTIFICATE OF
IDENTITY AND
REGISTRATION

I, Gilbert MADDY II, request that my Passport
(Name) (Certificate of Identity and Registration)

be amended to include my wife, _____, who was born at _____
(Name in full) (Place and State or country)

_____ to whom I was married on _____ at _____
(Date) (Date of marriage) (City, State, or country)

whose photographic likeness is attached.
My wife's maiden name was _____

and she ☐ was not previously married.
☐ was previously married on _____
(Important: Date of each previous marriage must be given)

she was formerly married to _____
(Full name of former husband)

_____ at _____
(Date) (City, State, or country)

she was born at _____ and the marriage was terminated by death on _____
(City, State, or country) (Cross out one) (Date)

her present address is _____
(City) (State) (Country)

My wife's last American passport was obtained from _____ ON _____
(Insert Washington, or location of office abroad) (Date)

It is submitted herewith for cancellation _____
(Give disposition of passport if it cannot be submitted)

I request that my Passport
Certificate of Identity and Registration be amended to include my minor children, as follows, whose
photographic likeness is attached.

_____, born at _____ ON _____
(Name in full) (Place and State or country) (Date)

resided in the United States from _____ to _____

and is now residing at _____

_____, born at _____ ON _____
(Name in full) (Place and State or country) (Date)

resided in the United States from _____ to _____

and is now residing at _____

I ☐ have been naturalized as a citizen of a foreign state; taken an oath or made an affirmation or other formal
declaration of allegiance to a foreign state; entered, or served in, the armed forces of a foreign state; accepted, or performed
duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof; voted
a political election in a foreign state or participated in an election or plebiscite to determine the sovereignty over foreign
territory; made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign
country; been convicted by court martial of deserting the military or naval service of the United States in time of war, or of
committing any act of treason against or of attempting by force to overthrow, or of bearing arms against the United States.
If any of the above-mentioned acts or conditions are applicable to the applicant's case, or to the case of any other person
included in this application, a supplementary statement under oath should be attached and made a part hereof.

Gilbert MADDY II

(Signature of applicant)

Kabul, Afghanistan

(Foreign name and address)

American consular service at Kabul

I CERTIFY that the person to whom the above passport was issued
appeared before me in person and signed and swore to the above

application on the 26th day of May, 1946

George E. Palmer
(Signature)
American Vice Consul
(Title)NOTE.—To be sworn to at option of Consular Officer. (No fee if sworn to before
Consular Officer.)Applications may be accepted by mail if they have been sworn to before a local
officer authorized to administer oaths for general purposes. In such a case the
foreign official should fill out, sign, and affix his seal to the jurat above.George E. Palmer
American Vice Consul



EXHIBIT A-10

APPLICATION FOR RENEWAL OF PASSPORT

CAUTION.—Extension of expressly limited passports must be applied for on Form 219

In conformity with the rules and regulations prescribed by the President and the Secretary of State pursuant to law, I, the undersigned, hereby apply for a renewal of the period of validity of my passport, the number and date of which appear hereto.

RENEWAL SERIES No. 11
Passport No. 65722
Passport Serial No. --
Issued on May 2, 1946 at Washington,
(Date) (Place) D. C.

I, Gilbert Waddell, 1 naturalized American citizen, was never married
(Name) (native) (married on)

(To be filled in by women only)

My husband is a 1 naturalized American citizen
an alien, a citizen of _____
(Name of country)

My legal residence is None
(Street address) (City) (State)

I represent the Morrison-Knudsen Afghanistan, Inc.
(Name of person or organization)

The part in this block is to be filled in by all persons who have acquired citizenship through naturalization.

Since my present passport was issued, I have resided outside the United States at the following places for the periods stated:

_____ from _____ to _____
_____ from _____ to _____
_____ from _____ to _____

The purposes of my visits to the foregoing countries were:

(Give reasons or reasons for stay in each country named)

Gilbert Waddell

(Signature of applicant)

Kabul, Afghanistan

(Foreign address)

I CERTIFY that the person to whom the above passport was issued appeared before me in person and swore to and signed the above application on the 26th day of May, 19 46

Item no. 6
Service no. 95
Fee \$5.00

George E. Palmer
(Signature)
George E. Palmer
American Vice Consul, Kabul
(Title)

American Legation, Kabul,

(Residing office)

Afghanistan

[SEAL]

(OVER)

George E. Palmer
American Vice Consul

Waddell

Cilaret

Office used



[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

Held, taxpayer was not, during the taxable year, a bona fide resident of Afghanistan and, accordingly, was not entitled to the exemption from taxation by the United States provided by section 116(a)(1), I.R.C., as amended by the Revenue Act of 1942.

James F. Butler, Esq., for the Petitioner.

John D. Picco, Esq., for the Respondent.

The respondent determined a deficiency of \$2,362.65 in petitioner's income tax for the year 1947. The only issue here presented is whether petitioner qualifies under section 116(a)(1) so as to exclude from gross income the salary earned by him in the taxable year for personal services rendered in a foreign country.

Findings of Fact

Most of the following facts were stipulated:

Petitioner is an individual citizen of the United States who timely filed his Federal income tax return for the year 1947 with the collector of internal revenue for the district of Idaho at Boise, Idaho.

Petitioner and Mable Waddell, his wife, were married in 1919 and divorced in 1946. As the issue of this marriage, there were born three daughters, all living. At the time of the divorce the two older daughters were and still are married and living with their respective husbands. The younger daughter, Joanne Waddell, was then and still is a minor, whose care and custody were by the divorce decree awarded

to petitioner. The minor daughter resides with her married sister, Mrs. T. A. Burda, at 421 8th Street, Huntington Beach, California. Petitioner provides for and finances her upkeep and schooling. Petitioner has been a single man since the entry of the divorce decree on February 22, 1946.

Petitioner was born in Kansas in 1897, and prior to May 1946 made his residence in Irwin, Idaho. He was, and is, an engineer by occupation, and in 1921 accepted employment as an engineer with the Bureau of Reclamation, U. S. Department of Interior. Petitioner was continuously employed by the Bureau of Reclamation from 1921 until May 3, 1946, when he resigned to accept employment with Morrison-Knudsen Afghanistan, Inc., a Nevada corporation. In his letter of resignation, dated April 19, 1946, petitioner stated that he was resigning "in order to accept private employment with a company engaged in development of irrigation projects in foreign countries." During his employment with the Bureau of Reclamation, petitioner had acquired a Civil Service P-3 rating and such retirement pension rights as provided by the governing laws and regulations.

Petitioner signed a contract of employment with Morrison-Knudsen Afghanistan, Inc., on May 9, 1946. Among other provisions of such contract were the following:

2. Place of Employment

The services of Employee shall be performed in Afghanistan at any one or more of the places therein which may be designated by Employer, or, at Em-

ployer's option, at such other place or places outside said country which Employer may designate in connection with the performance of said construction contract.

* * * * *

4. Period of Employment

The period of services provided for by this Contract shall be twenty-four (24) months at the site of the work after Employee's arrival at such site, provided that in the event Employer's construction contract is completed or terminated before the expiration of said period, this Contract shall thereupon terminate, and Employer shall only be obligated to pay Employee for services rendered to the date of such termination or completion and salary during the return trip to the United States as provided in Paragraph 6 and return travel expenses as provided in Paragraph 8.

* * * * *

6. Date of Commencement of Salary

Salary shall commence four days prior to the date on which Employee has been advised to report at point of leaving the continental limits of the United States enroute to the site of the work. Except as provided in Paragraph 10 herein, salary shall continue for four days after Employee returns to the continental limits of the United States, * * *

* * * * *

8. Return Travel Expense

If Employee completes this contract in accordance with the terms hereof and said contract is not terminated by Employer under the provisions of

Paragraph 10 hereof, he shall be returned from job site to the point of hire at Employer's expense. Employer shall select the mode of transportation. * * *

10. Termination of Contract

If the services of Employee are not satisfactory to Employer or if he is not qualified for the position for which he is hired, or is negligent in his duties, or displays bad temper, or is or becomes addicted to the use of alcoholic drinks or drugs, or is insubordinate, or contracts venereal disease, Employee may be discharged by Employer and this contract shall terminate forthwith. * * *

* * * * *

12. Board and Lodging

Employer agrees to furnish Employee with board and lodging during the term of this contract, or cash allowance in lieu thereof at Employer's option.

* * * * *

14. Withholding from Salary

Employee agrees that Employer shall withhold from the salary of Employee an amount equal to the transportation costs referred to in Paragraph 8. However, not more than one-third of Employee's earnings for any month shall be so withheld. The amount thus withheld shall be refunded to Employee upon completion of this Contract. If Employee quits or is discharged for any of the reasons specified in Paragraph 10 hereof, the amount withheld shall be applied by Employer against the costs which Employer may incur in returning Employee to United States and the balance remaining, if any, shall be refunded to Employee.

15. Income or Other Taxes

Employer will pay and not recharge to Employee income or any other taxes imposed by any country on salary earned by Employee under this Contract, other than taxes imposed by United States of America or any state thereof.

* * * * *

17. Employee to Observe Afghan Laws

The Employee shall respect and obey all Afghan laws, rules and regulations and shall never interfere with the Afghan political or religious affairs either directly or indirectly, and he shall not engage in trade.

* * * * *

The Morrison-Knudsen Co., Inc., is a domestic corporation engaged in the construction business. This company established a foreign division composed of several subsidiary corporations prior to the end of the war for the purpose of contracting for and carrying on construction work in foreign countries. Morrison-Knudsen Afghanistan, Inc., is the subsidiary corporation which operates solely in the Kingdom of Afghanistan.

In 1946 Morrison-Knudsen Afghanistan, Inc. entered into a four-year contract with the Kingdom of Afghanistan whereby said corporation agreed to build certain roads and canals. A second four-year contract was executed by Morrison-Knudsen Afghanistan, Inc. and the Kingdom of Afghanistan in April of 1950, providing for the construction of certain storage dams.

Petitioner arrived in Afghanistan on June 13, 1946, and worked for two years, the period required by his contract. Petitioner left Afghanistan on June 13, 1948, and returned to the United States at company expense, arriving on June 20, 1948. He remained in the United States for the remainder of the year. On January 22, 1949, he signed a second contract of employment with Morrison-Knudsen Afghanistan, Inc. He left the United States on January 27, 1949, and arrived in Afghanistan on February 6, 1949. Petitioner worked until October of 1949, when the company terminated his contract pursuant to paragraph 4 thereof, because of an enforced reduction of personnel due to temporary curtailment of construction funds. Thereupon petitioner returned to the United States, at company expense, arriving on October 28, 1949. Petitioner lived in the United States until approximately May 11, 1950, when he signed a third contract of employment with Morrison-Knudsen Afghanistan, Inc. This contract is substantially similar in its terms to the employment contracts dated May 9, 1946 and January 22, 1949. Petitioner departed for Afghanistan on May 11, 1950, and at the time of the trial of this proceeding was serving the company in Afghanistan pursuant to the contract of employment.

Petitioner's entire income during the calendar year 1947 was earned by him while employed in the Kingdom of Afghanistan, where he was physically present during the whole of that year.

At all times while employed in Afghanistan, peti-

tioner lived in quarters furnished by the company, namely, in a brick building built by the company and maintained for its employees, where he received his board and lodging free of cost. Petitioner was free to obtain outside board and lodging, but he did not, because had he done so he would have had to pay for same out of his own pocket and the board and lodging so purchased would have been inferior. While thus employed in Afghanistan, petitioner maintained no home, residence building or apartment in the United States. Petitioner did not participate in local politics nor did he engage in trade. Petitioner did not pay any taxes to the Afghan authorities, and no tax was ever levied upon him by the Kingdom of Afghanistan, nor did the company pay any taxes on his behalf.

While in the United States from June 20, 1948 to January 22, 1949, petitioner visited friends and took care of his personal affairs at Boise, Idaho, and elsewhere, and stayed at the homes of his married daughters and of his sister in California, Idaho and Nevada. He stayed with them for approximately three and one-half months, and for almost two and one-half months he lived in a rented apartment in Berkeley, California. While in the United States from October 28, 1949 to May 11, 1950, petitioner lived approximately one month at the homes of his married daughters and approximately six months in a rented apartment in Berkeley, California. Petitioner was not under any contractual obligation to the company or any other employer, while in the

United States during the years from 1947* to 1949, inclusive, and received no compensation from any employer for work done in the United States, or elsewhere.

Petitioner applied for a passport on April 13, 1946, prior to his departure for Afghanistan. At that time he stated that he was domiciled in the United States, and that his permanent residence was 316 Broadway, Boise, Idaho, which is the address of the general business offices of Morrison-Knudsen Co., Inc. On June 24, 1947, petitioner went to the American Consulate in Kabul, Afghanistan, and made application for registration. In this application he stated that his legal residence in the United States was Boise, Idaho, and he further stated that "I intend to return to the United States within one year to reside permanently." On May 26, 1948, he applied for an extension of his passport. On April 26, 1950, he applied for a passport, and one was issued on April 27, 1950. At that time he stated that his permanent residence was 421 8th Street, Huntington Beach, California, which is the address of T. A. Burda, petitioner's son-in-law. Petitioner does not own or have any financial interest in 421 8th Street, Huntington Beach, California, and has never resided there except as a guest of his son-in-law and daughter.

Prior to leaving the United States in 1946, peti-

* The year 1947 in the stipulation is obviously in error, as petitioner was in Afghanistan throughout that year.

tioner expressed the thought that, except for vacations, he would be gone from the United States all of his remaining gainful life. His salary abroad was approximately double that which he had ever earned in the United States. During his visits in the United States petitioner expressed himself as expecting to return to Afghanistan as soon as possible.

We make the ultimate finding of fact that petitioner, during the taxable year, was not a bona fide resident of the country of Afghanistan.

Opinion

Van Fossan, Judge: The present case presents a narrow issue, that is, whether respondent erred in his determination that the petitioner was not a bona fide resident of Afghanistan during the taxable year 1947, and, accordingly, was not entitled to exclude from his gross income compensation received by him for personal services performed in a foreign country under favor of section 116(a)(1), as amended by the Revenue Act of 1942.¹

¹Sec. 116. Exclusions from gross income.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) Earned Income from sources without the United States.—

(1) Foreign resident for entire taxable year.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year,

There are almost as many varying shades of definition of the words "residents" and "residence" as there are cases involving the subject. The word "residence" has been characterized as an ambiguous, illusive, flexible or relative term. In some cases it is held to be synonymous with domicile, although generally connoting something quite different. Again, it may be synonymous with "home", or it may not be. One test seems to be generally accepted. When used in a statute it must be interpreted in the light of its context and the purpose and the intent of the framers of the legislation.

A full consideration of the legislative history of section 116(a)(1) will be found in *Arthur J. H. Johnson*, 7 T.C. 1040, and *Downs vs. Commissioner*, 166 Fed. (2d) 504, affirming 7 T.C. 1053; certiorari denied, 334 U.S. 832. We need not repeat that discussion here. These decisions, and others, indicate that there is no single test to be applied in the present instance. Thus the test applied in *Kyle vs. Jones*, 92 Fed. Supp. 600, that mere physical presence of a taxpayer in a foreign country for the full year ripens the right to exemption is too simple and is out of line with better reasoned opinions interpreting the statute, as amended in the 1942 Revenue Act. Each

amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income as defined in paragraph (3); but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

case must rest on its own facts and no single fact is determinative.

Weighing all the facts carefully and having studied the several cases on the subject, we believe the record here requires our ultimate finding of fact that petitioner was not, during the taxable year, a bona fide resident of Afghanistan and, therefore, was not entitled to the exemption from taxation in the United States of compensation received in a foreign country. See Arthur J. H. Johnson, *supra*; Downs vs. Commissioner, *supra*.

Decision will be entered for the respondent.

Entered April 11, 1951.

Received T.C.U.S. April 9, 1951 .

The Tax Court of the United States
Washington

Docket No. 24483

GILBERT WADDELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered April 11, 1951, it is

Ordered and Decided: That there is a deficiency in income tax of \$2,362.65 for the year 1947.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Entered April 11, 1951.

Served April 13, 1951.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 24483

GILBERT WADDELL,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

PETITION FOR REVIEW

To the Honorable the Judges of the United States
Court of Appeals for the Ninth Circuit:

The petitioner in support of this his petition filed pursuant to the provisions of section 1001 of the act of Congress approved February 26, 1926, entitled "The revenue act of 1926" and the acts amendatory thereof and supplemental thereto, for the review of the decision of The Tax Court of the United States, rendered April 11, 1951, approving a deficiency in income tax of the petitioner for the calendar year 1947 in the amount of \$2,362.65, respectively shows to this honorable court:

I.

That the nature of the controversy is as follows:

(A) That section 116 of the Internal Revenue Code, (being Title 26, sec. 116, U.S.C.A.), in so-far-as it pertains to this cause, is as follows:

Section 116. Exclusions from Gross Income.

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) Earned income from sources without the United States.

(1) Foreign resident for entire taxable year. In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income as defined in paragraph (3); * * *

(2) * * *

(3) Definition of earned income. For the purposes of this sub-section, "earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, * * *

(B) That on file, as part of the record in this cause, is the stipulation made by and between the respective parties to this litigation, in which the facts upon which this case was tried were agreed upon, except as to the ultimate question as to whether the petitioner, Gilbert Waddell, was a bona fide resident of a foreign country or countries during the entire taxable year 1947. As to that question, petitioner introduced oral testimony at the hearing before the

Tax Court of the United States, said testimony being, also, a part of the record in this cause.

(C) That the said stipulation covers many factual points, but, in brief, sets forth that:

(1) The petitioner, Gilbert Waddell, was at all times herein mentioned an individual citizen of the United States;

(2) That he was physically present in the Kingdom of Afghanistan, a foreign country, during the entire year 1947;

(3) That his income in that year was composed of amounts received from a source without the United States, to-wit: from Morrison-Knudsen Afghanistan, Inc., a corporation operating solely within the Kingdom of Afghanistan; and

(4) That the amounts so received constituted earned income, as defined in section 116(a)(3) of the Internal Revenue Code (hereinabove set forth), being salary earned by petitioner for services performed by him in the Kingdom of Afghanistan;

(D) That the facts so stipulated were found by and incorporated in the opinion of the court below;

(E) That, at the hearing of this cause before the court below, petitioner presented oral testimony tending to show his intent to establish residence in Afghanistan and that he had entertained such an intent at all times since prior to his departure from the United States, going to Afghanistan, in the year 1946; that the court below found as a fact that peti-

tioner had made the statements relied upon by petitioner to establish his intent in that regard, but made no specific finding as to petitioner's intent, or want of intent, to establish and maintain a residence in Afghanistan, during the year 1947.

(F) The cause was heard at Portland, Oregon, before the Honorable Ernest H. Van Fossan, Judge of the Tax Court of the United States, on October 26, 1950, and thereafter and on the 11th day of April, 1951, he entered in said court and cause his Findings of Fact and Opinion, in which it was found as an ultimate fact that petitioner, during the taxable year 1947, was not a bona fide resident of the country of Afghanistan; and, as a matter of law, that petitioner was not entitled to the exemption from taxation provided by section 116(a) of the Internal Revenue Code. On the same date the Order and Decision of the court was entered in favor of the respondent herein for a deficiency in petitioner's tax for the year 1947 in the sum of \$2,362.65.

II.

That petitioner is a citizen of the United States of America and of the State of Idaho, and being aggrieved by the said findings of fact, opinion, order and decision, seeks a review thereof in accordance with the provisions of the revenue act of 1926, and the acts amendatory thereof and supplemental thereto, by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue for

the Idaho collection district, with whom petitioner made and filed his return of income.

III.

The petitioner, as a basis for review, makes the following assignment of error:

That the Tax Court of the United States erred in finding that Gilbert Waddell, petitioner herein, was not a bona fide resident of the Kingdom of Afghanistan, a foreign country, during the entire year 1949, and in its decision, based thereon, that said petitioner's income tax return for that year disclosed a deficiency.

Wherefore your petitioner prays that this honorable court may review such findings, opinion, order and decision and reverse and set aside the same, and that the clerk of the Tax Court of the United States be directed to transmit and deliver to the clerk of this court certified copies of each and every of the documents necessary and material to the presentation and consideration of the foregoing petition for review, and as required by the rules of this court and the statutes made and provided.

/s/ JAMES F. BUTLER,
Attorney for Petitioner.

Duly Verified.

Received and Filed T.C.U.S. July 9, 1951.

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF APPEAL

To Charles Oliphant, General Counsel, Bureau of
Internal Revenue, Washington, D. C., Attorney
for Respondent-Appellee:

Notice is hereby given that Gilbert Waddell, Petitioner-Appellant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the decision of the Tax Court of the United States made and entered in the above entitled cause on April 11, 1951.

/s/ JAMES F. BUTLER,
Attorney for Petitioner-
Appellant.

Acknowledgment of Service attached.

Filed T.C.U.S. July 11, 1951.

The Tax Court of the United States
Washington

[Title of Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 22, inclusive, constitute and are all of the original papers and proceedings, including Exhibits 1-A to 4-D, inclusive, attached to the stipulation of facts and Respondent's Exhibit "E" admitted in evidence, on file in my office as the original and complete record in the proceeding before The

Tax Court of the United States in the above entitled proceeding and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 27th day of July, 1951.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

The Tax Court of the United States

Docket No. 24483

GILBERT WADDELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

United States Courthouse, Portland, Oregon

Thursday, October 26, 1950

Met, pursuant to notice, at 9:40 a.m.

Before: Hon. Ernest H. Van Fossan, Judge.

Appearances:

James F. Butler, appearing for Petitioner.

John D. Picco, appearing for Respondent. [2*]

PROCEEDINGS

The Clerk: Docket No. 24483—Gilbert Waddell.

Mr. Picco: John D. Picco, for the Respondent,
ready.Mr. Butler: James F. Butler, for the Petitioner.
Ready, your Honor.The Court: Mr. Butler, will you state the issues in
this matter.Mr. Butler: If the Court please, this is a very
simple case. The Petitioner, Gilbert Waddell, went
to Afghanistan in 1946 to serve as an engineer on a
construction project in that country. The construc-

* Page numbering appearing at top of page of original certified
Reporter's Transcript.

tion project contemplates the construction of a series of earth dams, canals, ditches and laterals on a high plateau, and foreseeably that construction job will extend for many years in the future. He was employed under employment contract, a printed form, and that printed form is uniform in all cases in that it provides, among other things, for employment for twenty-four months. It has provisions in it. This employment contract will be in evidence.

The employment contract provides that at the end of the twenty-four months period he shall be shipped home at Company expense and provided vacation on pay, depending upon the length of his service and for a great many other things. [3]

Mr. Waddell served his full two years and came home on vacation and stayed for a matter of six months, two of which were on paid vacation the other four months being at his own expense, during which period he didn't work for anyone else. He then renewed his employment contract and went back to Afghanistan in January of 1949. At that time he stayed ten months and although this second contract provided for twenty-four months employment he actually worked only ten months, at which time his employer ran out of money—that is the appropriation from the King of Afghanistan ran out—and so his employment was terminated until more money could be made available.

He returned home and waited approximately another six months and at that time a new contract was negotiated with the King of Afghanistan and his employer, so along in the early part of May of this year

he signed a new twenty-four months employment contract and is back in Afghanistan, where he expects to continue and to be forced to be present for at least another five years before he can come home on another vacation.

All the facts in this matter with the exception of the intent of the petitioner have been reduced to written stipulation and will be introduced here. The facts in that stipulation, of course, are a little bare, as is necessary in a written stipulation of that sort. The facts, however, do [4] show that Mr. Waddell was in Afghanistan, visibly present, during the entire year 1947, which is the year in controversy, and all his income in that year was the result of his earnings in Afghanistan; that he filed an Income Tax Return with the Collector for the District of Idaho covering his earnings for the year 1947 in which he reported his earnings and claiming as exempt under Section 116-A of the Revenue Code on the ground that he was a bona fide resident of Afghanistan and that his earnings were exempt as being earned by him in Afghanistan.

Subsequently his position in that respect has been denied and tax assessed on the basis that he did not qualify as a person who is entitled to take that exemption.

The only matter of testimony which we shall introduce in this court this morning will be evidence tending to establish the intent of the Petitioner as regards his foreign employment and his career in foreign construction work. It is our position, of course, that under the rulings of various Circuit Courts of Ap-

peal and of the Tax Court that the physical presence of a taxpayer in a foreign country during the entire year, and the fact that he is living there and making his living there, is about all that should have to be proved in order to establish the taxpayer's right to the exemption provided in the statute.

Just to be on the safe side, and because there is [5] some confusion in the minds of a great many people as to just what residence as required by the statute entails, we have thought that it perhaps was necessary to go into the matter of the Petitioner's intent from the very inception and prior to the time that he signed this contract and first left for Afghanistan in 1946.

There is a great deal more that could be said at this time. I'd like to say that it's an interesting story. I think perhaps in view of other matters we should proceed to an examination of the only witness present.

Mr. Waddell, the Petitioner, is, as I say, in Afghanistan and will be unable to be here to testify in his own behalf.

I think that outlines the facts as they are known, roughly and briefly, and we will proceed.

The Court: Mr. Picco, you may state the Government's position.

Mr. Picco: The counsel for Petitioner has roughly outlined the facts, your Honor. The issue here is whether the Petitioner, under the evidence, establishes bona fide residence in Afghanistan in the year 1947. I just want to point out one or two circumstances that are in the stipulation of facts that haven't been pointed out by counsel. One, of course,

that he did not pay any taxes to the foreign country; that he did not engage in trade or politics, and [6] that was contrary to his contract; that he was quartered in the building maintained by the Company for the employees and received his board and lodging free, at cost. He did have the privilege of going outside if he desired but he would have to pay that out of his own pocket.

But the one fact that I would like to stress is the document, Exhibit A, attached to the stipulation, which are passport applications and documents of the State Department, which shows that in June of 1947, which was the tax year, Mr. Waddell, the Petitioner, applied to the American Vice Counsel at Kabul where he applied for registration as a United States citizen in a foreign country, and in that application he stated that he intended to return to the United States within one year, which he did do, to reside permanently. We feel that that's one evidence of the state of his mind, particularly in the year 1947 which is in issue.

That will be all your Honor. If agreeable to you we would like to enter the stipulation of facts which has been signed.

The Court: The stipulation may be submitted. How many exhibits are attached?

Mr. Picco: There are four exhibits attached, Exhibits 1, 2, 3 and Exhibit A.

The Court: These are not numbered or lettered in accordance with the rules. The rules provide that exhibits [7] attached to stipulation should be lettered 1-A, 2-B, 3-C, and so forth.

Mr. Picco: I'm sorry. We were under the impression the exhibits that he presented would have the usual number, 1, 2, 3, and the exhibits that we presented——

The Court: When they are made joint exhibits they cease to be individual exhibits.

Mr. Picco: I'm sorry. Will you accept these as they are, Your Honor?

The Court: Yes. It will be received.

Mr. Picco: Thank you.

Mr. Butler: Your Honor, I wonder if it would help if we stipulate here orally that the Exhibits attached to the stipulation may be renumbered to correspond with the rules of the court?

The Court: That might as well be done.

Mr. Butler: And stipulate further that they are the joint exhibits of the Petitioner and the Respondent.

The Court: You may do that.

(Joint Exhibits 1-A, 2-B, 3-C and 4-D, attached to stipulation, received in evidence.)

[Printer's Note: Joint Exhibits 1-A, 2-B, and 4-D are set out in full at pages 24-52 of this printed record.]

Mr. Picco: If agreeable to the Court, Respondent would like to introduce into evidence Respondent's Exhibit B, which is the Individual Income Tax Return of taxpayer. [8]

The Court: If these Exhibits are renumbered four of them will take 1-A through 4-D. Your next Exhibit will be E.

Mr. Picco: Respondent's Exhibit E?

The Court: Yes.

Mr. Picco: Thank you.

The Court: There is no objection to this, Mr. Butler?

Mr. Butler: No, Your Honor, I have no objection.

Mr. Picco: According to the stipulation it's agreeable with counsel.

The Clerk: What year is that?

Mr. Picco: That's '47.

The Court: It will be received in evidence.

(Respondent's Exhibit E received in evidence.)

EXHIBIT E-1

File this return with Collector of Internal Revenue on or before March 15, 1948. Any balance of tax due (item 9, below) must be paid in full with return. See separate instructions for filling out return.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN FOR CALENDAR YEAR 1947

1947

or fiscal year beginning 1947, and ending 1948

EMPLOYEES—Instead of this form, you may use your Withholding Statement, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Statements or of such wages and not more than \$100 of other wages, dividends, and interest.

Do not write in these spaces

File Code
Serial No. **8153113**

District
(Cashier's Stamp)

Name Gilbert Waddell

(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS of Morrison Knudsen Afghanistan

(PLEASE PRINT. Street and number or rural route)

Kabul Afghanistan

(City or town, postal zone number)

(County)

(State)

Occupation Engineer

Social Security No. 519-20-7340

List your own name.
If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in Instruction 1) with 1947 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

1.	Name (please print)	Relationship	Name (please print)	Relationship
	<u>Gilbert Waddell</u>	<u>*****</u>	<u>Joanna Waddell</u>	<u>Daughter</u>

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1947, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues,

insurance, bonds, etc. Members of armed forces and naval reserves or reemployed reservists, see Instruction 2.

2.	Principal Employer's Name	Where Employed (City and State)	Amount
	<u>Morrison-Knudsen Afghanistan Inc.</u>	<u>Kabul, Afghanistan</u>	<u>82</u>

No taxable income under section 116-A of the Internal Revenue Code for the year of 1947

- Enter here the total amount of your dividends..... 2.60
- Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation).....
- If you received any other income, give details on page 2, and enter the total here.....
- Add amounts in items 2, 3, 4, and 5, and enter the total here.....

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 1.

YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 2. You may either take a standard deduction of \$100 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one has itemized deductions, the other must also itemize deductions.

- Enter your tax from table on page 4, or from line 12, page 3..... 236.21
- How much have you paid on your 1947 income tax?
(A) By withholding from your wages.....
(B) By payments on 1947 Declaration of Estimated Tax.....
Enter total here → 236.21
- If your tax (item 7) is larger than payments (item 8), enter **BALANCE OF TAX DUE** here..... 0
- If your payments (item 8) are larger than your tax (item 7), enter the **OVERPAYMENT** here..... 0

Check (✓) whether you want this overpayment: Refunded to you ☐ or Credited on your 1948 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1945
Which Collector's office was it sent? Boise, Idaho
Which Collector's office did you pay amount claimed in item 8 (B), above?

If your wife (or husband) making a separate return for 1947? ☐
If "Yes," write below:
Name of wife (or husband).....
Collector's office to which sent.....

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Signature of person (other than taxpayer or agent) preparing return..... Gilbert Waddell 3/14/48

(Name of firm or employer, if any)

(If this is a joint return of husband and wife, it must be signed by both)



Gilbert Waddell
c/o Harrison-Kruson Afghanistan
Kabul, Afghanistan

EXHIBIT
E-2

Dear Mr. Waddell:

We acknowledge receipt of your 1947 income tax return, wherein you claim that your earnings are exempt, under Section 116-A of the Internal Revenue Code.

You are advised that from the information that we can obtain, you are under contract employment with the Harrison-Kruson Afghanistan Incorporated, that your residence is only temporary and that you will return to the United States.

Kindly furnish this office with the extent of your earnings for the entire year and also a complete statement of your contract of employment. If there is any doubt as to whether or not your income is taxable, we will submit your problem to the Commissioner of Internal Revenue for a ruling.

Several cases of persons working for the Harrison-Kruson Company have already been ruled on, and in each case it was ruled that their income was taxable. It is very difficult for a citizen of the United States taking temporary employment outside of the United States to qualify under Section 116 of the Internal Revenue Code.

Please give this matter your immediate attention. Attach the enclosed copy of this letter for identification purposes, as we are holding your return in our suspense file.

Very truly yours,

JOHN E. V. BLAKE, COLLECTOR

By

Myron E. Anderson, Chief
Income Tax Division

ADDITIONAL DEDUCTIONS

TAX COMPUTATION—FOR PERSONS WHO USE TABLE ON PAGE 4

Amount shown in item 6, page 1. This is your Adjusted Gross Income.

REDUCTIONS (If deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1), is \$1,000 or more and deductions are not itemized, enter the standard deduction of \$500)

line 2 from line 1. Enter the difference here. This is your Net Income.

or exemptions (\$300 for each person whose name is listed in item 1, page 1).

line 4 from line 3. Enter the difference here.

tax rates in instruction sheet to figure your combined tentative normal tax and surtax on amount entered on line 4. Enter the tentative tax here. (If line 3, above, includes partially tax-exempt income, see Tax Computation instructions.)

line 5 from line 4. Enter the difference here.

line 7 from line 6. Enter the difference here. This is your combined normal tax and surtax. (If alternative tax credit is made on separate Schedule D, enter here tax from line 12 of Schedule D.)

IF YOU USED THE OLD STANDARD DEDUCTIONS IN LINE 2, SUBMITTED LINES 5, 11, AND 12, AND REPLY ON LINE 12 THE NAME FIGURE YOU ENTERED ON LINE 4.

any income tax payments to a foreign country or U. S. possession (attach Form 1040).

any income tax paid at source on tax-free government bond interest

figures on lines 9 and 10 and enter the total here

line 11 from line 8. Enter the difference here and in item 7, page 1. This is your tax.

110.00	00
500.00	00
105.50	00
10.00	00
95.50	00
277.00	00
124.25	00
236.25	00
236.25	00

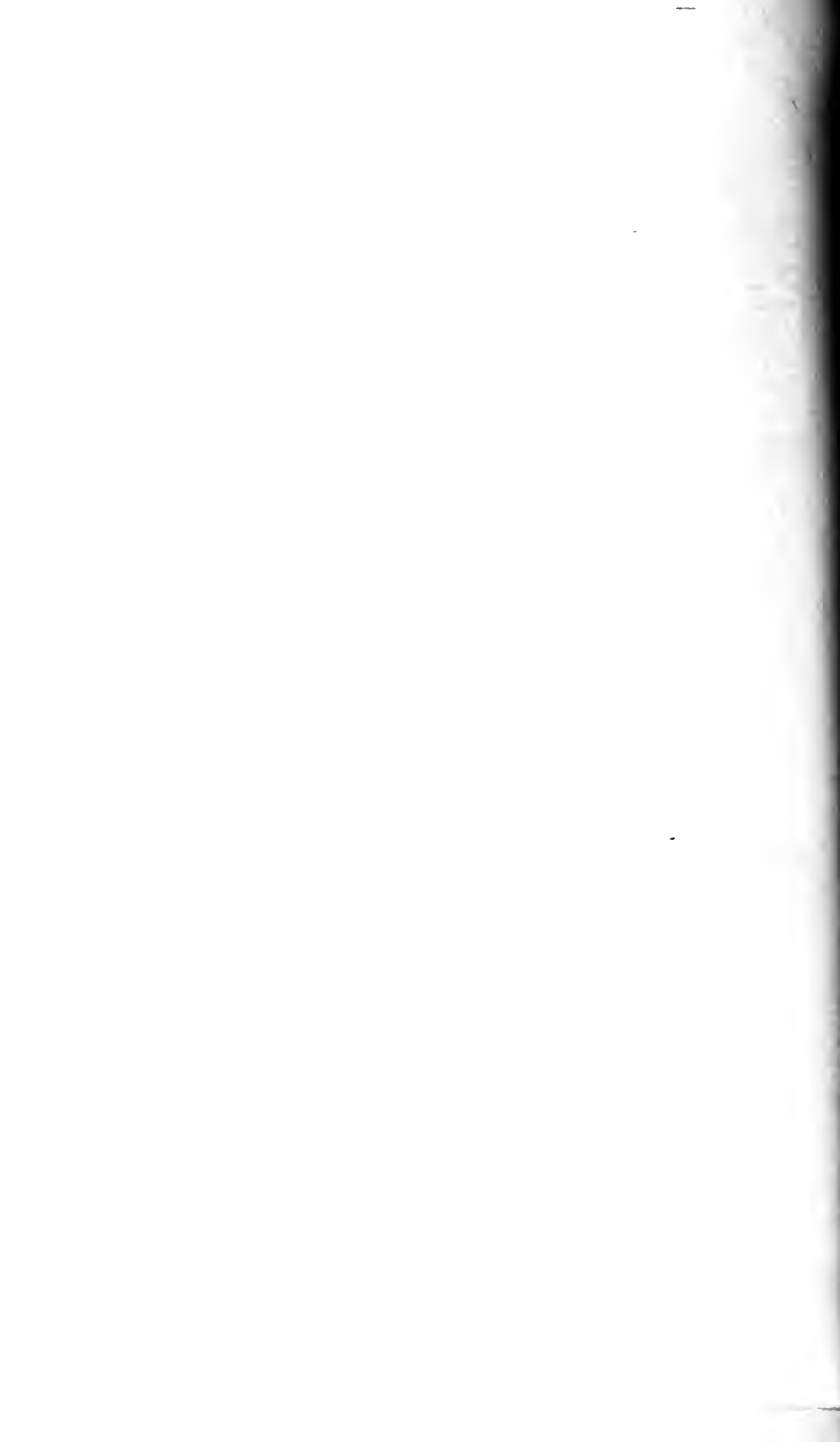


EXHIBIT E3

Kabul, Afghanistan
14 March 1948

Collector of Internal Revenue
Boise, Idaho

Dear Sir:

During the whole of the calendar year 1947
I have been a resident of Afghanistan and have earned no
income within the United States.

Therefore, under Section 116-A of the Internal
Revenue Code, I have no taxable income.

Yours very truly,

Gilbert Waddell
Gilbert Waddell

CW:jlg

3

82
RECEIVED
MAR 26 1948
COLL. INT. REV.
DIST. IDAHO



EXHIBIT E-4

File this return with Collector of Internal Revenue on or before March 15, 1948. Any balance of tax due (item 9, below) must be paid in full with return. See separate instructions for filling out return.

Page 1

FORM 1040
Bureau Department
of Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN

FOR CALENDAR YEAR 1947

1947

or fiscal year beginning 1947, and ending 1948

EMPLOYEES—Instead of this form, you may use your Withholding Statement, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Statements or of such wages and not more than \$100 of other wages, dividends, and interest.

Do not write in these spaces

File

Code

Serial

No.

District

(Cashier's Stamp)

Name Gilbert Waddell

(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS McMason-Kaulsen Afghanistan

(PLEASE PRINT. Street and number or rural route)

Afghanistan Kabul

(City or town, postal zone number)

(Country)

(State)

Occupation Engineer Social Security No. 519-20-7340

List your own name.

If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

1. Name (please print) Gilbert Waddell Relationship XXXXXX

Name (please print) Joanne Waddell Relationship Daughter

Name (please print) Kabul Waddell Relationship divorced wife

Note - Divorced wife alimony payment \$1200.00 per year

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1947, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

2. Prior Employer's Name McMason-Kaulsen Where Employed (City and State) Afghanistan Inc. Kabul, Afghanistan

Amount \$11,050.00

3. Enter here the total amount of your dividends \$11,050.00

4. Enter here the total amount of your interest (including interest from U.S. Government obligations unless wholly exempt from taxation) \$11,050.00

5. If you received any other income, give details on page 2 and enter the total here \$11,050.00

6. Add amounts in items 2, 3, 4, and 5, and enter the total here \$11,050.00

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS \$5,000 OR MORE.—Discard the tax table and compute your tax on page 3. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

7. Enter your tax from table on page 4, or from line 12, page 3 \$11,050.00

8. How much have you paid on your 1947 income tax?

(A) By withholding from your wages \$11,050.00

(B) By payments on 1947 Declaration of Estimated Tax \$11,050.00

9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here \$11,050.00

10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here \$11,050.00

Check (r) whether you want this overpayment: Refunded to you ☐ or Credited on your 1948 estimated tax ☐

a return for a prior year, what was the latest year? 1945

Collector's office was it sent? Bose, Idaho

Collector's office did you pay Yes

claimed in item 8 (B), above?

are under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Signature of taxpayer Gilbert Waddell (Date) 5/25/48

(Name of firm or employer, if any) (Date)

(If this is a joint return of husband and wife, it must be signed by both)

10-40446-4 a-1

49 or 49 lines
Print none 5/10/49 Lb



Mr. Picco: Respondent requests the privilege of withdrawing these Exhibits and substituting photo-static copies.

The Court: That may be done. Proceed with the evidence.

Mr. Butler: Mrs. Burda, will you come forward, please. [9]

HELENE BURDA

was called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination:

The Clerk: Will you state your name for the record, please?

The Witness: Helene Burda.

Q. (By Mr. Butler): Mrs. Burda, are you related to the Petitioner, Gilbert Waddell?

A. Yes, I'm his daughter.

Q. Is your mother living?

A. Yes, she's living.

Q. Is she still married to your father?

A. No, they were divorced in February of '46.

Q. February 1946. And with respect to the time your father first went to Afghanistan this divorce preceded that by several months?

A. That's right.

Q. Your father ever since that divorce has been and still is a single and unmarried man?

A. Yes, he is.

Q. Now with respect to the rest of the family, are you the oldest daughter? [10]

(Testimony of Helene Burda.)

A. I am.

Q. And you are married? A. Yes.

Q. And where do you reside?

A. At 421 Eighth Street, Huntington Beach, California.

Q. You reside there with your husband and children? A. Yes.

Q. And you have another sister, what's her name?

A. Geraldine Sergeson, and she lives in Kennett Square, Pennsylvania.

Q. She is married? A. Yes.

Q. Resides there with her husband?

A. Yes.

Q. Now there is a third sister?

A. Yes, I have a small sister. She's sixteen and she lives with me most of the time. I take care of her financial and education and everything like that. She stays with me.

Q. And the costs of her care and education is borne by whom?

A. My father has a bank account for me for her.

Q. And that's all the members of the family?

A. Yes.

Q. Your father has the custody and care of Joan? A. Yes. [11]

Q. Under the divorce decree?

A. That's right.

Q. And your father also supports your mother through monthly alimony payments?

A. Yes.

(Testimony of Helene Burda.)

Q. Now, your father is an engineer by profession?

A. Yes, he's an expert on earth-filled dams. He has worked on them for some twenty-five years.

Q. And before his employment with Morrison-Knudsen-Afghanistan, Inc., by whom was he employed?

A. Well, he was employed by the United States Bureau of Reclamation for about twenty-five years.

Q. And his work was principally specialized in construction of earth dams? A. Yes.

Q. Now, directing your attention to the year 1946, and the period just before your father left for Afghanistan, this being after the divorce, did you have occasion to see your father personally?

A. Yes. He had found out that he was going to Afghanistan and my husband and myself and my sister and her husband and my younger sister all—we were all up in Irwin, Idaho. My husband and I made a special trip up there to say good-bye to my father since he was going to be gone for some time. [12]

Q. Now, at that time it was necessary for your father to make arrangements for Joan's support and care during his absence; is that not true?

A. Yes.

Q. And with whom did he make those arrangements?

A. Well, he talked it over with me and since I was the oldest and was in a position to take care of her I assumed that responsibility.

(Testimony of Helene Burda.)

Q. In connection with his remarks to you about taking care of her did he make any statements to you as to how long he intended to be gone to Afghanistan?

A. Well, this is a rather mammoth project over there and he felt that there was enough work over there to keep him busy for the rest of his professional life.

Q. He made such a statement to you, did he?

A. Well, he said he would have vacations from time to time but that inasmuch as he could make the kind of money that he wanted over there, and could make it in a short period of time, that he felt it was worth it to give up his Bureau of Reclamation job and take something a little more lucrative and get it all over with in approximately ten years, he said. Then there was——

Q. Now, quite aside from the fact that the project was large, and would take a good many years as far as his information was concerned, did he give you to understand that he did intend to stay over there; that is, of course, excepting his vacation, but that he intended to work on that kind of work, and in Afghanistan, for the rest of his professional career?

A. Yes. There was not only that project, there were several others that he could have been transferred to. There was Ceylon and so many of them. He was quite excited about it because, oh, I guess the adventure of the whole thing, or something, but

(Testimony of Helene Burda.)

there are so many foreign projects and he was quite anxious to get into that type of work.

Q. Now did he discuss with you the differences that this kind of work would make in his income?

A. Yes. He was held back in the Bureau because of lack of education and he never could advance to the point where he should have, so he felt that this kind of work would net him what he should get out of his professional life.

Q. With respect to his financial burdens at that time, just what was the situation?

A. Well, I don't really know his salary but he paid my mother a good deal of alimony and my smaller sister was getting to the point where he had to figure on education, college and one thing and another, and keeping up two establishments and trying to put a little school money away and things like that, he just couldn't make it on his present salary. I think that was a big factor in his deciding to [14] take up that type of work.

Q. And did he inform you that his income with Morrison-Knudsen-Afghanistan, Inc., would be substantially larger than his income with the Bureau?

A. Oh, yes, it was at least double. As I say, I don't know the exact figures but it was a good deal more.

Q. Well, let's see, your father left originally for Afghanistan sometime in the month of June, 1946?

A. That's right.

Q. And when did you next see him?

(Testimony of Helene Burda.)

A. Well, he came back in June of '48 after two years over there.

Q. And at that time did he discuss with you his further plans?

A. Well, I believe he expected to go back sooner than he did but he had some dental work and some medical work and took a big long vacation. I don't know, it was pending some sort of arrangement on his work but he really didn't expect to spend as long as he did. However, it was a nice vacation.

Q. He stayed here about six months on that occasion? A. Yes, about six months.

Q. And how long after he first got home and you talked to him was it before he started to talk to you about his further plans?

A. Well, he hadn't been in the house twenty-four hours [15] until he told us he was going right back. As I say, he anticipated to go back sooner and he thought his vacation would be cut just a little bit short. He knew the day he got back that he was returning.

Q. That he was returning to Afghanistan?

A. That's right.

Q. And so then he did go back about when?

A. I think it was January of '49.

Q. And when did you next see him?

A. It was ten months. It was a two-year contract like the other but they ran out of funds and he returned in ten months.

Q. That puts it you saw him then along sometime the latter part of October or November of 1949? A. That's right.

(Testimony of Helene Burda.)

Q. And at that time did he make any statements to you relative to his intention to return to Afghanistan?

A. Well, he was just biding his time until they got some more money and could send him back over again.

Q. He made that statement to you that that was his intent?

A. That's right. He didn't know how long it would be but he just had to sit around and wait until they were ready to send him back.

Q. And then your father left, he did actually leave [16] and return to Afghanistan?

A. The first part of May.

Q. Of which year? A. 1950.

Q. And he is there now?

A. Yes, and this time I think he anticipates a four or five year job without taking his vacations or anything. It seems sort of a long ways back and forth and unless something should come up I think he'll just remain there for at least five years more—unless they run out of money again or something unforeseen.

Q. He made the statement to you that that was his intention, before he left? A. Yes.

Q. Now, during all this period since 1946 when your father left has he owned or rented or otherwise maintained any residence, building or apartment or hotel room or other place that you might call a home or a residence for him in this country?

A. Not that I know of. His mailing address was

(Testimony of Helene Burda.)

my home because we take care of his insurance premiums and things like that.

Q. Now, let's see, you say his mailing address is your home? A. Yes. [17]

Q. What is your residence address?

A. 421 Eighth Street, Huntington Beach, California.

Q. With respect to your residence at 421 Eighth Street, in Huntington Beach, does your father have any financial interest in that residence?

A. No, he doesn't.

Q. Whose property is that?

A. It belongs to my husband and I.

Q. During the periods when your father was in this country first during the latter part of 1948 and beginning in the winter months of 1949 and the early part of 1950, do you know whether your father worked for anyone in this country?

A. No, he didn't work, he just went around visiting old friends and more or less just having a vacation.

Mr. Butler: I think that will be all.

The Court: You may cross-examine.

Cross Examination

Q. (By Mr. Picco): Mrs. Burda, did you get many letters from Mr. Waddell in 1947, at the time he was in Afghanistan?

A. Yes, the usual amount.

Q. Did he tell you anything about the country in those letters?

A. Well, he tried to make his letters interesting

(Testimony of Helene Burda.)

and tell us about the natives and one thing or another. He [18] usually mentioned his work one way or another, how it was going, if it was going well or otherwise.

Q. Did he say he liked the country?

A. Well, he liked that type of work. He was very very fond of his career. I don't know whether he was actually in love with the country but he does like his work.

Q. Did he ever mention to you in those letters of 1947 that he was homesick for the United States?

A. Well, he was homesick for his family. My little sister especially. They were very close.

Q. Did he express complete satisfaction with his working conditions over there?

A. Well, as far as I know he was perfectly satisfied.

Q. I'm asking whether in his letters he made statements?

A. Well, I really couldn't say. It's been several years. I can't remember everything he said in his letters but I know in general it was satisfactory to him.

Q. Did he say in his letters during 1947 that he had changed his mind about his plans for employment in Afghanistan?

A. Well, no, he couldn't very well change his mind because his intention was to get enough money made in ten years—

Q. Did he make that statement, Mrs. Burda?

A. No, not that I know of. [19]

(Testimony of Helene Burda.)

Q. In Exhibit A attached to the stipulation here there is an application for registration which shows that in June of 1947 Mr. Waddell went to the American Vice-Consul at Kabul and in his application he stated that he was going to return to the United States within one year and he intended to reside in the United States permanently at that time. Now in view of that, did the letters you received during this time, 1947, from Mr. Waddell, reflect that state of mind?

A. Well, no. He had no place to reside. He didn't have enough money to buy a home or a ranch or anything by that time, and there was no place else for him to live. He never has had a residence in the United States since he went over there.

Q. Well, he could have gotten a residence in the United States easily enough, couldn't he?

A. Well, he would have had to find some type of employment, and Morrison-Knudsen did not employ him in the United States.

Q. Now Mr. Waddell returned to the United States sometime in June of 1946 after his two-year contract expired; is that correct? A. '48.

Q. '48. I'm sorry. He was down on vacation you say?

A. Yes, he was all over on a vacation.

Q. You stated on your direct examination that he was [20] on vacation for six months; is that right?

A. Well, he was waiting for another contract and naturally he vacationed while he was waiting.

Q. Was he certain of getting another contract?

(Testimony of Helene Burda.)

A. Well, with all that work in view, and everything had been satisfactory. He had no reason to believe that he wouldn't get another contract.

Q. He waited for six months, did he not, for the second contract?

A. Yes, but he had a little health problem. He had a good deal of medical work and some dental work and things like that to look into, and he vacationed for about three months and then went to work on himself.

Q. Actually he had two months vacation with pay under his contract; is that correct?

A. I believe that's what the contract says. I don't really know too much about their contract.

Q. Where did he stay during this six months after he got back in 1948?

A. Well, first he went to Irwin, Idaho. And then he went down to San Francisco. Then he came down to Huntington Beach. Then he went up to Ruth, Nevada. Then he went to Yellowstone Park. He was just all over. He saw everyone that he ever knew, I believe. He just spent all that time traveling back and forth to see people. [21]

Q. You say there was something wrong with his health during this period of six months?

A. Well, he had a doctor in Boise that had operated on him some years back. I wouldn't say what year it was because I can't recall; but he had a good deal of dental work done in Huntington Beach by my dentist and then he had some more work done in Boise by a dentist. He had some sort of an im-

(Testimony of Helene Burda.)

pacted tooth, or something. I can't recall what it was but it was a regular operation. I know he suffered a good deal with it.

Q. I understand he went back after signing a second contract for two years sometime in January, 1949?

A. That's right.

Q. Now, he didn't work two years on that contract, did he?

A. No, they ran out of money and he was—consequently they ran out of work and he was sent home in ten months.

Q. How long did he stay before he got another contract this time?

A. Well, I think it took them about six months to get some more money and he just sat around and waited. He expected to go at any time, any time from the time he came home.

Q. Wasn't he a little insecure, uneasy about getting another contract? [22]

A. Well, I don't know the why and wherefore, how they obtain this money, but he seemed very certain that it was just a matter of time.

Q. I want to direct your attention again to any letters you might have received from him in 1947. Did he tell you anything about the quarters in which he lived there?

A. Well, he traveled somewhat in Afghanistan from one job to another. In a country that size I believe they're spread out. He wrote me something of the hotels but I believe he spent most of his time at M-K quarters because that's where he was stay-

(Testimony of Helene Burda.)

ing, as far as I know.

Q. The M-K quarters, they were the quarters that were built by the Company?

A. I don't know. I guess they were built by the Company, or taken over by the Company, something like that.

Q. Did he tell you anything about these quarters, I mean the confines of the camp or wherever he was?

Mr. Butler: I object, your Honor. Not proper cross-examination in the scope of the direct examination.

The Court: She may answer.

A. He may have mentioned it but I don't recall anything specific. He was more interested in telling us about the people and the customs and things like that. I don't think his quarters would probably have been anything to write about anyway. [23]

Q. Did he tell you about how heavy his work was?

A. No. I imagine it's a good deal like the work he's always done. It probably was just the same as always.

Q. Did he tell you when he had time to go around and see things?

A. Not especially; I don't think so. He might have mentioned something about it but I don't remember anything specific.

Q. Did he tell you whether the Company had any rules or regulations against mixing with the local population? A. No.

Q. Or against going into cities? A. No.

(Testimony of Helene Burda.)

Mr. Picco: That's all.

The Court: Any other questions, Mr. Butler?

Mr. Butler: I would like to develop one point.

Redirect Examination

Q. (By Mr. Butler): Mrs. Burda, you have been asked on cross examination whether your father told you about his freedom to mix with the local population. Actually, did your father ever mention any dealings that he had with people in Afghanistan, that is, the natives in Afghanistan?

A. Well, they employed the native Afghanistsans on certain jobs and he spoke of how they had to teach them [24] various things, if you can call that a dealing.

Q. And let me ask you further if he ever related to you any of his experience with the Government officials of Afghanistan?

A. Yes, I believe they had several parties and things for the M-K people. I think they did. I know he said he was in Kabul and I think he attended some sort of a party, at probably the Consul, I don't really recall exactly where it was but some sort of a social affair.

Q. Now, directing your attention more specifically to business affairs, I'm wondering if your father has related to you his experience in dealing with the representatives of the Kingdom of Afghanistan in connection with the construction work?

A. Well, I——

Q. Just, do you recall that he made any statements to you at all about that?

(Testimony of Helene Burda.)

Mr. Picco: I object to this, Your Honor. I think the stipulation will show that Mr. Waddell was an employee, he was not a supervisory official in any respect. I can't imagine that he could be dictating terms or having dealings with representatives of the Afghan authorities or government.

The Court: She may answer.

The Witness: I can't recall the question right now. I was listening and I've forgotten what the question was. [25]

Q. Mrs. Burda, I was simply asking whether you recall any statements made by your father about his dealings with Afghan officials about the construction contract. If he didn't make any such statements that's all well and good. If he did I would like to know those.

A. Well, this will be very vague because I didn't pay a great deal of attention to it, but on his last trip home he said something that someone over there had approached him about working for the Afghan government, in some capacity, I don't know what it was, but he said he could possibly work into something like that. It is all very vague because I don't recall much about it. I don't believe that he even considered leaving Morrison-Knudsen, but I believe he mentioned something to that effect.

Q. I see. That will be all.

The Court: You are excused.

(Witness excused.)

The Court: Does that constitute Petitioner's case?

Mr. Butler: Sir?

The Court: Does that and the stipulation constitute Petitioner's case?

Mr. Butler: That constitutes Petitioner's case, your Honor.

Mr. Picco: Respondent rests.

The Court: How much time do you wish for briefs? [26]

Mr. Picco: I would like about 45 days after he submits his brief, your Honor.

The Court: You may have 60 days for the original brief; 45 days for Government's reply, and 15 days thereafter for Petitioner's reply.

Mr. Butler: Thank you, your Honor.

Mr. Picco: Thank you, your Honor.

(Whereupon, at 10:20 o'clock a.m., Thursday, October 26, 1950, the above-entitled matter was concluded.) [27]

Filed T.C.U.S. November 13, 1950.

[Endorsed]: No. 13050. United States Court of Appeals for the Ninth Circuit. Gilbert Waddell, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed August 10, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

**In the United States Court of Appeals
for the Ninth Circuit**

No. 13050

GILBERT WADDELL,

Petitioner-Appellant,

vs.

**COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.**

**APPELLANT'S STATEMENT OF POINTS
RELIED UPON**

In the appeal of the above-entitled cause, the petitioner-appellant above-named intends to rely upon the following point:

That under the facts stipulated and agreed upon by the parties to this action and found as facts by The Tax Court of the United States, and the facts proved by the testimony offered at the hearing of this cause before the said Tax Court of the United States, and the law and regulations agreed to be applicable to and controlling upon said facts, the petitioner-appellant was not a mere transient or sojourner in the Kingdom of Afghanistan in the year 1947, but was a bona fide resident of the Kingdom of Afghanistan during the whole of said year 1947, and that his income earned in the Kingdom of Afghanistan in the year 1947, being earned income as defined in the statute in such cases made and provided and being amounts received from sources

without the United States by a citizen of the United States, was exempt from taxation by the United States.

/s/ JAMES F. BUTLER,
Attorney for Petitioner-
Appellant.

[Endorsed]: Filed Aug. 24, 1951. Paul P. O'Brien,
Clerk.

IN THE
United States
Court of Appeals
For the Ninth Circuit

GILBERT WADDELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Brief for Petitioner

*Petition to Review a Decision of the Tax
Court of the United States*

JAMES F. BUTLER

400 Continental Bank Bldg.

Boise, Idaho

Attorney for Petitioner.

November, 1951

FILED

NOV 19 1951



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Boise, Idaho
Attorney for Petitioner.

November, 1951

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ADDENDA

Since writing the Brief, to which this Addenda is attached, counsel for petitioner has learned that the Congress of the United States has amended Section 116, I.R.C., by the provisions of Section 321 of the Revenue Act of 1951.

As amended, Section 116 (a) reads as follows, the matter in said ~~paragraphs~~ ^{SECTION} changed by said Act being shown in italics:

“(a) *Earned Income from Sources without the United States.*—

(1) *Bona fide resident of foreign country.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the *Secretary* that he *has been* a bona fide resident of a foreign or countries *for an uninterrupted period which includes an entire taxable year*, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income (as defined in paragraph (3)) *attributable to such period*; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this *paragraph*.

(3) *Presence in foreign country for 17 months.*—In the case of an individual citizen of the United States, *who during any period of 18 consecutive*

months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income (as defined in paragraph (3)) *attributable to such period*; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this *paragraph*."

It seems apparent that the Congress of the United States has *always intended* that the *bona fide residence*, mentioned in Section 116(a), require only that the taxpayer be present in a foreign country or countries for one full taxable year under circumstances indicating that he was not a mere transient or sojourner, and that if the taxpayer lives in a foreign country and earns his living there, during 17 out of a total of 18 consecutive months, his residence is *bona fide* and a full compliance with the statutory requirement.

It also seems apparent that the changes in Section 116 which, as it stood, seemed perfectly clear and unambiguous, were made necessary by the fact that the Commissioner, the Tax Court of the United States and, in a few instances, other Courts, insisted upon a showing by the taxpayer claiming the benefit of said Section 116, that he had established and maintained a residence *almost amounting to domicile*. It would seem that Congress has now put it beyond equivocation

that a citizen earning his living in a foreign country may avail himself of the benefits of Section 116, I.R.C., by showing that he lived in a foreign country or countries for 18 consecutive months, including a 30-day vacation elsewhere. Petitioner submits that the Congressional intent so expressed has been the Congressional intent fully expressed by Section 116(a), I.R.C., even prior to the changes indicated.

No. 13050

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GILBERT WADDELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Brief for Petitioner

PRELIMINARY AND JURISDICTIONAL
STATEMENT

This is a Federal income tax case on appeal here from the decision of the Tax Court of the United States, the Honorable Ernest H. Van Fossan presiding (T. 65). The case was heard at Portland, Oregon, on October 26, 1950, and decision entered in favor of respondent on April 11, 1951 (T. 64).

The jurisdiction of the Tax Court of the United States is provided for, generally, by Sec. 1101, I.R.C. The statutory provision under which this action was prosecuted in the Court below appears as Sec. 272(a)(1), I.R.C. That Section, in pertinent part, is as follows:

“If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed the taxpayer may file a

petition with the Tax Court of the United States for a redetermination of the deficiency. * * * If the notice is addressed to a person outside of the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days."

In this case, the Commissioner determined a deficiency of \$2,362.65 in petitioner's income tax for the year 1947 and on or about March 4, 1949, notified petitioner thereof by letter addressed to petitioner in Kabul, Afghanistan. (See paragraphs I, II and III, petitioner's Amended Petition (T. 5), "Exhibit A" thereunto attached (T. 14), and paragraphs 1, 2 and 3 of respondent's Answer (T. 16), admitting the jurisdictional facts alleged.)

There after and on or about August 8, 1949, petitioner filed his petition for redetermination with the Tax Court of the United States (See docket entry, August 8, 1949—T. 3).

Neither the parties hereto nor the Court below have questioned the jurisdiction of that Court, although it does not appear from the record that the notice to petitioner was given by registered mail and the record appears to indicate that the original petition was filed in the Tax Court on a date more than 150 days after the date of the notice given.

The statutes governing the jurisdiction of appellate courts, under which this appeal has been taken, appear

as Sections 1141 and 1142, I.R.C. In pertinent part, these statutes are as follows:

SEC. 1141 (a)—The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, * * *

(b) (1) * * *, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the Collector's office to which was made the return of the tax in respect of which the liability arises * * *.

(c) (1) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or reverse the decision of the Board, * * *.

SEC. 1142. The decision of the Board rendered after February 26, 1926, (except * * *) may be reviewed by a Circuit Court of Appeals, * * *, as provided in Section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, * * *.

Petitioner's income tax return for the year 1947 was filed with the U. S. Collector at Boise, Idaho, (T. 5, 16 and 53) within the venue of the U. S. Court of Appeals, Ninth Circuit (Judicial notice). His petition for review was filed with the U. S. Court of Appeals, Ninth Circuit, on July 9, 1951, (T. 4 and 69) within three months aft-

er the decision of the Tax Court, rendered April 11, 1951, by filing the said petition with the Tax Court in accordance with Rule No. 31 of the said U. S. Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

A. THE QUESTION

Was Petitioner, Gilbert Waddell, A Bona Fide Resident of Afghanistan During the Taxable Calendar Year 1947?

The foregoing question is the sole question at issue in this proceeding. Answered in the negative, it was the basis of the Explanation of Deficiency furnished by the Commissioner (T. 15). It was also the only question for decision by the Tax Court of the United States and the only question of fact decided by that Court (T. 63).

The amount of the tax is not in dispute. If the foregoing question is answered in the negative, petitioner will be required to pay the tax assessed. Answered in the affirmative, the parties are left in status quo.

B. THE LAW AND REGULATIONS

This case is governed by Section 116, U. S. Internal Revenue Code, the material provisions of which are as follows: *See Amendment, Revenue Act of 1951 Addenda, pp. 8, 9 and 10.*

SECTION 116. EXCLUSIONS FROM GROSS INCOME

* * *, the following items shall not be included in gross income and shall be exempt from taxation under

this chapter:

(a) *Earned Income from Sources Without the United States*

(1) *Foreign Resident for Entire Taxable Year*

In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States * * *, if such amounts constitute earned income as defined in paragraph (3); * * *

(2) * * *

(3) *Definition of Earned Income*

For the purposes of this sub-section, "earned income" means wages, salaries, professional fees and other amounts received as compensation for personal services actually rendered, * * *

In addition to the foregoing statutory provisions, and interpretive thereof, the Commissioner of Internal Revenue has promulgated the following Regulation, having the force and effect of law:

REGULATIONS 111, SECTION 29.116-1 (AS AMENDED BY T.D. 5373, MAY 23, 1944)

"Earned Income from Sources Without the United States.—For taxable years beginning after

December 31, 1942, there is excluded from gross income, earned income in the case of an individual citizen of the United States, provided the following conditions are met by the taxpayer claiming such exclusion from his gross income; (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) such income would constitute earned income as defined in * * * Section 116 (a)(3) for taxable years beginning after December 31, 1943; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the *principles* of Sections 29.211-2, 29.211-3, 29.211-4 and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in

the United States in the case of an alien individual

* * * ”

Sections 29.211-2, 29.211-3, 29.211-4 and 29.211-5, as above stated, deal with the residence status of aliens. Section 29.211-3 does not seem to have any bearing upon this case. In order that the *principles* of Sections 29.211-2, 29.211-4 and 29.211-5 may be more intelligently applied, those Sections are set forth below, in material part, with interpolations where necessary to indicate the application of the Regulations to U. S. citizens residing abroad, rather than to alien individuals residing in the U. S. Variances of language from that appearing in the Regulations as issued are indicated by italics.

SECTION 29.211-2 — *Definitions* — * * * A citizen actually present in a *foreign country*, who is not a mere transient or sojourner, is a resident of the *foreign country* for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to *the United States* is not sufficient to constitute him a transient. If he lives in a *foreign country* and has no definite intention as to his stay, he is a resident. One who *goes to a foreign country* for a definite purpose, which in its nature may be promptly accomplished, is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and

to that end the *U. S. citizen* makes his home temporarily in a *foreign country*, he becomes a resident, though it may be his intention at all times to return to his domicile in the *United States* when the purpose for which he *went* has been consummated or abandoned. A *citizen* whose stay in a *foreign country* is limited to a definite period by the immigration laws is not a resident of the *foreign country* within the meaning of this section, in the absence of exceptional circumstances.

SECTION 29.211-4 — *Proof of Residence* — The following rules of evidence shall govern in determining whether or not a *U. S. citizen* within a *foreign country* has acquired residence therein within the meaning of Chapter 1. A *citizen*, by reason of his *citizenship*, is presumed to be a *resident citizen of the U. S.* Such presumption may be overcome—

(1) * * *

(2) in other cases by (a) * * * or (c) proof of acts and statements of a *citizen* showing a definite intention to acquire residence in a *foreign country* or showing that his stay in the *foreign country* has been of such an extended nature as to constitute him a resident. * * *

SECTION 29.211-5—*Loss of Residence*—A *U. S. citizen* who has acquired residence in a *foreign country* retains his status as a resident until he abandons the

same and actually departs from the *foreign country*. An intention to change his residence does not change his status as a *resident of a foreign country* to that of a *resident citizen*. Thus, a *citizen* who has acquired a residence in a *foreign country* is taxable as a *foreign resident* for the remainder of his stay in the *foreign country*.

C. THE FACTS

Most of the evidentiary facts were agreed to, and presented to the Court below on written stipulation (T. 18-24), to which were appended Exhibits No. 1, 2 and 3 (T. 24-44). By oral stipulation at the hearing on the case (T. 77), Exhibits A-1 to A-10, inclusive (T. 45-52B), and Exhibits E-1 to E-5, inclusive (T. 79-83), were admitted in evidence as joint Exhibits, along with Exhibits No. 1, 2 and 3, attached to the Stipulation (T. 24-44), which were intended to be redesignated as B-2, C-3 and D-4, respectively.

In its Findings of Fact and Opinion, entered April 11, 1951, (T. 53-63) the Court below found the facts in accordance with those agreed to in the said Stipulation (T. 53).

As stipulated by the parties or derived from the uncontroverted testimony of petitioner's witness, and found by the Court below, the facts are:

(1) that petitioner is an individual citizen of the United States (T. 53);

(2) that respondent, Commissioner, determined a deficiency of \$2,362.65 in petitioner's income tax for the year 1947 (T. 53) and so notified petitioner (T. 14-15) and (T. 5 and 16);

(3) that petitioner was physically present in Afghanistan from June 13, 1946, to the date of the trial, October 26, 1950, (T. 58) a period of four and one-third ($4 \frac{1}{3}$) years, except for two (2) vacations in the U. S.;

(4) that at all times while in Afghanistan, petitioner was employed as an engineer by an American corporation (T. 58);

(5) that petitioner's entire income during the calendar year 1947 was earned by him while employed in the Kingdom of Afghanistan, where he was physically present during the whole of that year (T. 58). Thus petitioner's income was from sources without the United States and was earned income as defined in Section 116(a)(3). Similarly, the facts found prohibit a finding that petitioner's income represents amounts paid by the United States or any agency or instrumentality thereof;

(6) that prior to leaving the United States in 1946, petitioner expressed the thought that, except for vacations, he would be gone from the United States all of his remaining gainful life (T. 60-61);

(7) that during his visits in the United States petitioner expressed himself as expecting to return to Af-

ghanistan as soon as possible (T. 61).

The foregoing facts constitute petitioner's case in chief and are believed by petitioner to satisfy every requirement of Section 116, I.R.C. (above quoted) and the Commissioner's own Regulations. Other facts are set forth in the Stipulation. These are of two (2) kinds: (1) Facts agreed to, such as petitioner's marital status, intended to apprise the Court of facts present or absent from this case which distinguish this case from others, and (2) agreed facts thought to bring this case within the orbit, or partially so, of other decided cases. These facts will be discussed in the Argument.

SPECIFICATION OF ERROR

Petitioner makes the following assignment of error:

That the Tax Court of the United States erred in finding as an ultimate fact that petitioner was not a bona fide resident of Afghanistan, a foreign country, during the entire year 1947, and in its decision, based thereon, that petitioner was not entitled to the statutory exemption from taxation of compensation received for services performed in a foreign country and that petitioner was deficient in his income tax for the year 1947 in the amount of \$2,362.65 (T. 61-64 and T. 69).

Petitioner will here show that the finding of ultimate fact by the Court below is inconsistent with the probative facts stipulated by the parties and found by the Court

below, and is contrary to the governing statutory law and Regulations applicable to this case.

ARGUMENT

Analysis of Sec. 116, I.R.C., hereinabove quoted, shows that petitioner is entitled to the benefit of that Section upon showing that (a) he is an individual citizen of the United States, (b) he is a bona fide resident of a foreign country (c) during the entire taxable year, and that the income was (d) received from sources without the United States, and (e) constituted "earned income" as defined by the statute. Most of these elements stand admitted.

Respondent admits, and the Court below found, that petitioner (a) was and is an individual citizen of the United States (T. 53); that he was (b) physically present in Afghanistan for four and one-third ($4 \frac{1}{3}$) years after June 13, 1946, except for vacations, and during the entire year 1947 (T. 58); (c) that his entire income was earned by him in Afghanistan as an employee of Morrison-Knudsen Afghanistan Inc., an American corporation operating solely in Afghanistan (T. 57 and 58), and, hence, was received by him from sources without the United States, and (d) being salary received by him for services performed as an engineer (T. 58) constituted "earned income" as defined in Sec. 116(a)(3). I.R.C.

It was contended by respondent and found by the

Court below, (T. 63) that petitioner was not a bona fide resident of Afghanistan during the entire year 1947, within the intendment of Sec. 116, I.R.C. It remains only to determine whether that finding was or was not "in accordance with law." (See Sec. 1141(c)(1), I.R.C., quoted above.) The law applicable is Section 116, I.R.C., analyzed above, the respondent's own Regulations (set forth above) and the case law. The law will be here discussed in that order.

No definition of a "bona fide resident of a foreign country" appears in the statute. The Commissioner, respondent here, has defined the term at length in his Regulations. Petitioner's position is that he is a "bona fide resident of a foreign country" under respondent's own definition.

(1) VACATIONS—Petitioner, after working in Afghanistan for two full years, June 13, 1946, to June 13, 1948, visited in the United States (T. 58) and spent approximately seven months in the U. S., resting, traveling, visiting friends and relatives, and receiving a variety of medical treatments (T. 58-59 and 90). He did no work and earned no income (T. 59). He expected to return to Afghanistan earlier than he did, but was delayed by the extensive medical and dental treatments required (T. 95). From October 28, 1949, to May 11, 1950, petitioner again visited the U. S. (T. 59). This time his return and stay in the U. S. was not voluntary, but was occasioned by business considerations, although

the vacation was welcome in view of the fact that petitioner intended and expected to return to Afghanistan for an uninterrupted term of several years (T. 91). During this second vacation of about six months, petitioner did no productive work and earned no income (T. 59). He returned to his employment at the earliest possible time that business conditions would permit (T. 91). He returned to his former work—not a different job—after each vacation. He last was in the U. S. on May 11, 1950, (T. 58) and has not since returned. He was still in Afghanistan, working at the same job for the same employer in the same country on the date of the trial, October 26, 1950, (T. 58) and has since married and now resides with his wife in that country, where he has been promoted to chief engineer in charge of construction of the large irrigation storage dam there being constructed. The dam will not be completed for several years (T. 88 and 60-61).

As to the subject of Vacations, respondent Commissioner has written (Reg. 111, Sec. 29.116-1): “* * * However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. * * *”

(2) TRANSIENT OR SOJOURNER — The respondent Commissioner says, in effect (Reg. 111, Sec. 29.211-2): *A citizen actually present in a foreign country, who is*

not a mere transient or sojourner, is a resident of the foreign country for the purposes of the income tax. That Regulation has the force and effect of law and is binding upon the Commissioner as well as petitioner.

The Court below found that, except for vacations, petitioner was actually in Afghanistan for 4 1/3 years; that he was there during the entire year 1947 (T. 58); that he was during the whole period living there, working there, earning his living there (and nowhere else) and that his entire income during the year 1947 was earned by him as compensation for services performed there. If he was a transient or sojourner anywhere, it was while he was in the U. S. as a mere visitor, traveling, visiting his family, attending to his health, doing no productive work and earning no income (T. 59, 90 and 95.)

(3) INTENT —

(a) RULE OF EVIDENCE — Respondent, Commissioner, has prescribed rules of evidence governing taxpayers claiming the benefit of Sec. 116, I.R.C. (Reg. 111, Sec. 29.211-4, above). In effect, he has said that a U. S. citizen is presumed to be a resident of the U. S., but that the presumption is overcome by proof of acts and statements of the citizens showing a definite intention to acquire a residence in a foreign country, or showing that his stay in the foreign country has been of such an extended nature as to constitute him a resident.

Accordingly, petitioner proved by the testimony of Mrs. Burda (T. 85-100) that petitioner stated to her, before he left for Afghanistan in May, 1946, that he expected (intended) to work in Afghanistan for the rest of his professional life (T. 88 and 61). Each time he returned to the U. S. on vacation, he expressed his intent to return to Afghanistan as soon as possible (T. 61 and 90), to resume his job, which he estimated would last at least ten (10) years. These statements, we submit, are efficient to overcome the presumption of residence in the U. S., when coupled with proof of his subsequent acts and conduct not inconsistent therewith.

When the petitioner left the U. S. in May, 1950, he stated that he intended to remain in Afghanistan for about five years, without taking vacations (T. 91). At the time of trial, petitioner could show that he had lived in Afghanistan, except for vacations, only 4 1/3 years. At the present time, he has lived and earned his sole income there for 5 1/2 years. The statements made by him as to his intent are borne out and corroborated by his subsequent conduct. We submit that the acts and statements proved by petitioner and found by the Court below, as above-described, show a definite intent to acquire a residence in Afghanistan, in the absence of proof that he maintained a residence elsewhere. Certainly petitioner has shown that his stay in Afghanistan "has been of such an extended nature as to constitute him a resident." Only in New England is one considered "a

mere transient or sojourner" after he has lived and earned his income there for 5 1/2 years.

(b) OTHER CONSIDERATIONS — In defining "a bona fide resident of a foreign country" (Reg. 111, Sec. 29-211-2, above), respondent says a U. S. citizen is such, if he "is not a mere transient or sojourner." He does not define "sojourner," but defines "transient" at considerable length, and says that it is all a matter of intent. Petitioner went to Afghanistan expecting and intending to live and work there for a long and indefinite time, variously estimated at approximately ten years (T. 88 and 93) and "all his remaining gainful life." (T. 61 and 88.) He intended to come home to the United States to retire. As to this, respondent himself has said: Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to the United States is not sufficient to constitute him a transient. *If he lives in a foreign country and has no definite intention as to his stay, he is a resident there.*

Petitioner was almost 50 years of age when he first went to Afghanistan (T. 54). His health was not good (T. 95) and his back, once broken, might give out at any time. The Russians on the north border of Afghanistan might stop the reclamation project, so hurriedly being pushed to completion at the behest of the Department of State of the United States. Conscious of these uncertainties, petitioner avers (T. 8) that he intended

to enter upon a career of foreign employment, to live and work in Afghanistan for the remainder of his productive, professional life (T. 8), of whatever length that might be, and, if not in Afghanistan, then in some other foreign country (T. 9 and 88). Certainly, petitioner has lived in Afghanistan for 5 1/2 years "with no definite intention as to his stay." Respondent says that makes petitioner a resident of Afghanistan. And we say that respondent is bound by his own rule.

Respondent says further: One who goes to a foreign country for a definite purpose, which in its nature may be promptly accomplished, is a transient (Reg. 111, Sec. 29.211-2). That rule is no solace for respondent here. There is no evidence in the record that petitioner went to Afghanistan for a purpose which could be promptly accomplished. Even if the Court should believe the unlikely hypothesis of respondent, that petitioner went to Afghanistan for the sole purpose of fulfilling a two-year employment contract, a two-year contract cannot be accomplished "promptly" even by bureaucratic standards.

Finally respondent says, in the same Regulation: * * * but if his purpose is of such a nature that an extended stay *may* be necessary for its accomplishment, and to that end the citizen makes his home *temporarily* in a foreign country, he becomes a resident. Petitioner thinks that statement applies to him. He is an expert, trained by the Federal government in the engineering phases of

the construction of earth-dams (T. 7, 19 and 54). He was sent by his employer to Afghanistan to build such a dam. He spent almost three years, June, 1946, to October, 1949, in locating a proper site for the dam and making other necessary arrangements preparatory to building it (T. 20, 21 and 57). He now estimates that it will take 5 years from and after May, 1950, to build the dam (T. 91). That dam is only part of the whole project planned for Afghanistan by its King and the U. S. Department of State, which is interested in making anti-communist farmers out of the Afghan nomads. His employer has negotiated a 4-year contract with the Kingdom of Afghanistan for the primary purpose of building that dam (T. 57), and others. Whether the dam can be built in four years, using Afghan labor under primitive conditions, is an open question. In any event, reclamation projects are not accomplished "promptly." Petitioner went to Afghanistan with a purpose of such a nature that an extended stay *would certainly* be necessary for its accomplishment, and to that end he made, and after 5 1/2 years is still making his home "temporarily" there. Respondent says that under such circumstances one becomes a resident of a foreign country. We do not disagree.

In addition to statements as to his intent made to Mrs. Burda, the *only* witness to testify at the trial in the Court below (T. 88), petitioner in 1946, before he went to Afghanistan and before any thought arose in his mind that an expensive law-suit might arise which would turn

on the question of his intent, wrote a letter of resignation to his former employer, the Bureau of Reclamation (T. 24), which was Exhibit 1, attached to the Stipulation of Facts and admitted in evidence as Exhibit B-2 (T. 54 and 77). The letter was admissible both under the Commissioner's Regulation, above-quoted, and under the "ancient document" exception to the general rule against self-serving evidence. Not only is the letter admissible, it should be *persuasive* as evidence of petitioner's state of mind as early as April 19, 1946. In that letter, a man almost 50 years old resigned from the security of a civil service position (T. 54), and the retirement pension rights appurtenant thereto, to accept employment in a primitive, arid wasteland. Mature reason says this was no boyish response to the call of adventure. A mature and seasoned man in bad health relinquishes security only with the intent to enter upon an assured and permanent employment offering greater compensation. Increased compensation for a short period of two years does not, despite respondent's protest, appeal to a man who may be left at the end thereof partially disabled, past middle-age and unemployed.

(4) PETITIONER'S RESIDENCE IN AFGHANISTAN—Respondent thinks it significant (T. 76) that petitioner had no home of his own in Afghanistan, but lived in quarters provided by his employer and ate his meals in the mess-hall. Viewed in the light of the fact that petitioner lived in similar company-built or government-built camps and mess-halls during most of his career in the United States,

that fact begins to look less significant and quite normal. Reclamation projects, domestic or foreign, are built in deserts, far from towns and traditional "residences." Laborer and engineer alike customarily live in any tent, shack or barracks furnished by anyone. Residences in the traditional style are not available to members of construction crews on this type of work.

It is true that, during his career in the United States, petitioner maintained a home for his wife and children. But after his divorce in 1946, (T. 19 and 53) that home was broken up. Thereafter petitioner not only did not have any home, in the sense of a residence structure, in Afghanistan, as pointed out by respondent, he did not own or rent one in the U. S. either (T. 22 and 59). This seems to bring petitioner's case within the Rule in *Swenson vs. Thomas* (5th U.S.C.A.) 164 Fed. 2nd, 783-4, wherein the Court said:

"But notwithstanding that he established no fixed home in Colombia, or even a settled place of abode, his work requiring him to be ever on the move, it remains true that *he was always living in Colombia, attending to his business there; and that we think constitutes residence there.*" (Emphasis ours.)

Black's Law Dictionary, 3rd ed., defines "resident" as follows:

"One who has his residence in a place. The term is an elastic one and may mean a person who is

domiciled at a place, or a citizen, *or merely one who is temporarily living at a place, or carries on a business there.*"

(Citing many cases—Emphasis ours.)

The foregoing quotation and definition seem to coincide with the respondent's notions about the subject expressed before this case came to trial. Now respondent says petitioner was not a resident of Afghanistan because he was living there in barracks furnished by his employer. In his Regulation, Sec. 29.211-2, respondent said: * * * but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end *the citizen makes his home temporarily in a foreign country*, he becomes a resident.

It thus appears that the respondent agrees that petitioner needs prove no permanent home in Afghanistan, and a temporary home can be a "bona fide residence," as required by the statute. We find no case holding that a person cannot establish temporary residence in quarters furnished to him without cost by another.

From the fact that petitioner lived in quarters furnished by his employer, and ate in Company mess-halls, respondent and the Court below seem to think this case is governed by the holding in *Downs vs. Commissioner*, 166 Fed. 2nd, 504 (T. 62). In that case, Judge Stephens found controlling facts not present in this case. There, Downs and Hoofnel agreed that they could not take

their wives or families with them. Petitioner has his wife with him in Afghanistan today. He had no wife from the time of his divorce, February, 1946, until his remarriage in July, 1951. In discussing the details of the conditions of their employment, the Court said of Downs and Hoofnel: "It will be seen that persons employed under the contract * * * were handled, controlled and restricted much the same as military personnel." The contractual provisions he found in those cases are not duplicated in petitioner's contract. Judge Stephens himself stated that the difference between the holding of the 5th U.S.C.A. in *Swenson vs. Thomas*, supra, and his own holding in the *Downs* case, supra, was due to the marked differences in the facts of the respective cases. The facts he found were summarized as follows:

"Neither Hoofnel nor Downs was abroad on foreign trade; their situation had no relation to peacetime economics. Their activities were wholly those of war performed in camps of the United States Government located in a foreign country for strategic purposes under limited consent of a foreign power. In practically all but geography, petitioners were on American soil, actually under the American flag, performing services for the benefit of the American Government, using materials furnished them by the American Government through the American contractor—Lockheed. * * * "

It is submitted that the facts above-recited are not to

be found, either in whole or in part, in the present case.

However, the facts found by Judge Sibley in *Swenson vs. Thomas*, supra, sound very similar to those in the case at bar. Therein, Swenson, an engineer, went to Colombia, South America, under a 3-year contract, terminable on 30-days' notice, to prospect for oil, in charge of a crew of laborers. He moved his camp frequently, and lived in forests and jungles. After three years, he renewed his contract for one more year, and returned to the U. S. after four years there. In his passport application he stated he expected to return in three years. Judge Sibley said: "*We think there is no evidence whatever that there was any want of good faith. Swenson did not live in Colombia to evade taxes or for any bad purpose, but only to do the work he was sent to do. We think there can be no doubt that his continuous and unbroken living there for four years was 'residence'.*"

Judge Stephens reasoned that "makes his home temporarily," as used in the Commissioner's Regulation (Sec. 29.211-2), requires that the U. S. citizen living abroad, to constitute himself a bona fide resident of a foreign country, must identify himself *in some degree* with the customs of that country and live under and within such customs. He was unable to see that Downs and Hoofnel, while abroad, became in any degree a part of the foreign scene. But Judge Sibley thought that Swenson was part of the Colombian scene, as he moved

about through the jungles of that country performing his engineering duties. We submit that Gilbert Waddell, petitioner here, was likewise very much a part of the Afghan scene, as he roved for hundreds of miles across the north Afghan deserts, searching for dam-sites, planning for canals, laterals and ditches and performing his engineering duties.

In passing, Judge Sibley calls attention to Sec. 116(a) (2), which extends tax exemption to a U. S. citizen who has been a bona fide resident of a foreign country for two years and returns during the third year. We think it fair to infer that the Congress contemplated that a U. S. citizen might go to a foreign country in 1946, engage in business there in 1946 and the following two years, and return to the U. S. in 1949, entitled to his exemption from taxation as to his income earned abroad during the years 1947 and 1948 and partial year 1949. So far as appears from the statutory language, that whole business transaction could have been accomplished in a total period of *twenty-six months*.

(5) BONA FIDE —

In the words of Judge Sibley, we repeat: "*We think there is no evidence whatever that there was any want of good faith. Waddell did not live in Afghanistan to evade taxes or for any bad purpose, but only to do the work he was sent to do.*"

(6) THE CONTRACT —

Respondent attaches significance (T. 76) to the fact that petitioner's contract enjoined him from engaging in trade in Afghanistan and from *interference* with Afghan political and religious affairs (T. 34). Respondent also points out that petitioner paid no taxes to Afghanistan (T. 76), that his employer, by contract agreed to pay such taxes for him if any were levied (T. 33), and agreed to furnish board and lodging or the cash equivalent (T. 32).

Petitioner was brought to Afghanistan by his employer at great expense. It is only reasonable, and the customary practice in most employment relationships, that the employee agree, as Waddell here agreed (T. 27), that he would "devote his full time, attention, skill and ability to the performance of the duties of the position for which he was hired, * * * " That provision would be a reasonable one in any employment contract, whether to be performed in the U. S. or elsewhere. Petitioner could not perform that part of his contract and, simultaneously, engage in trade in Afghanistan. He owed his full productive capacity to his employer.

The contract prohibits petitioner's *interference* in Afghan religious and political affairs. This is not a surprising provision. The Kingdom of Afghanistan is an absolute monarchy—not a constitutional monarchy. Its population is largely wandering nomads of Mohammedan faith, with primitive ideas of justice. The con-

tract was drawn up with this provision, simply to provide the employer with a means of protecting a misguided employee from the swift and terrible consequences if his own acts, however well-intentioned. We wish to point out, however, that participation in political activities is safe, even for a citizen, in only *a very few countries*; and even in our own country political activity is a privilege of the *citizen* not extended to aliens.

Since interference with Afghan political and religious activities is the only matter prohibited, the legal inference is that all other normal activities are permitted to petitioner by his contract, except insofar as they might conflict with his duties to his employer. That should allow petitioner enough latitude to, in the words of Judge Stephens, *identify himself in some degree with the customs of Afghanistan, and live under and within such customs*.

It should be noted that petitioner's contract does not prevent him from following his own religion, nor does it prevent him from *participating* in Afghan religious or political affairs, so long as such participation does not amount to *interference*.

In the *Downs* and *Hoofnel* cases, *supra*, petitioners were closely supervised even in their off-duty hours. Respondent thinks those cases parallel this case, though he admits that the restrictions on Waddell were few (T. 76), and that Waddell was free to come and go at will, whether during business or off-duty hours (T. 22 and

76), and was free to live in the Afghan towns, at his own expense, if he so desired.

Out of decent respect for his own health, neither the Commissioner nor Waddell would have exercised the freedom of choice so permitted in favor of native accommodations. The Afghans irrigate their food crops and draw their drinking water from the same streams and canals into which they dump their waste and sewage. No rational human would jeopardize his health by eating native food and water even to save money. *A fortiori*, he would not pay a premium to risk the same dangers.

We submit that petitioner's acceptance, without obligation, of board and lodging furnished by his employer was in no degree comparable to the contractual restrictions upon the freedom of movement found in the *Downs* and *Hoofnel* cases, *supra*.

Finally, respondent points out that petitioner paid no taxes to Afghanistan (T.16). We fail to see the significance of that point, in view of the fact that respondent has stipulated (T. 22) and the Court below found (T. 59) that petitioner owed no taxes to Afghanistan.

There remains the question as to the effect of the employment period of twenty-four months, expressed in the contract. Respondent appears to contend that a citizen, who goes abroad under an employment contract

wherein a definite termination date is expressed, must be held to intend to return to the U. S. at the completion thereof and, therefore, to lack that essential indefiniteness as to the length of his stay required by Sec. 29.211-2 of the Regulations. Petitioner contends (T. 9) that the employment period is provided in the contract for purposes of determining the rights of the parties as to vacation and travel-time pay, transportation allowances and other matters, but was not intended to have any bearing upon the total duration of the employee's employment by his employer.

Reference to the detailed provisions of his contracts, Exhibit C-3 in evidence (T. 25) and Exhibit D-4 in evidence (T. 35), shows that paragraph 5 (Vacations), 6 (Commencement of Salary), 7 (Transportation and Travel Allowance), 8 (Return Travel Expense), 10 (Termination of Contract) and 14 (Withholding from Salary) constitute the bulk of the contracts and are all predicated upon the provisions of paragraph 4 (Period of Employment).

The fact that petitioner has been working for five and one-half (5 1/2) years in the same country, at the same job, for the same employer, under three separate contracts, each of which expressed a two-year employment period, tends to substantiate petitioner's claim that his employment is broken up into two-year phases for fiscal purposes, but is otherwise of a permanent and indefinite duration, as would be the case in any employment of an

individual by a corporation.

(7) RESPONDENT'S ANSWER —

Respondent's Answer (T. 16) is in the nature of an admission of certain jurisdictional facts alleged by petitioner and a denial of all facts not admitted. No new facts are alleged. The effect is simply to force petitioner to the proof of his case. Petitioner believes he has made out a very good case, and has, at least, sustained the burden of proof by proving a *prima facie* case. Having done so, it remains only to inquire whether the case made out by petitioner is at any vital spot over-weighed by respondent's evidence.

(8) RESPONDENT'S EVIDENCE—

Respondent called no witnesses to testify at the trial. He contented himself with an unproductive cross-examination (T. 92-97) of petitioner's witness. His only other evidence consisted of certain facts set forth in the Stipulation of Facts (T. 18) and certain Exhibits, introduced at the trial jointly with petitioner (T. 24-52B and 79-83).

In general, the Stipulation sets forth, briefly, facts favorable to petitioner's case. Stated in bare outline, the Stipulation sets forth as agreed facts all but one of the essential elements required by Sec. 116, I.R.C., as conditions prerequisite to the relief granted by that Section. The essential elements thus admitted and found by the Court below are that (a) petitioner is an individual citi-

zen of the U. S. (T. 18-53); (b) his income during 1947 was received from sources outside the U. S. (T. 21 and 58) and (c) such income was earned income as defined in Sec. 116(a)(3), I.R.C., being salary received for personal services rendered in Afghanistan.

The element not admitted was the requirement that petitioner be a bona fide resident of the Kingdom of Afghanistan during the entire year 1947, and, as to that, petitioner admitted (T. 21) and the Court below found (T. 58) that petitioner was physically present in Afghanistan during the whole of that year.

In that state of the record, what was petitioner required to prove beyond what stood admitted? If his stay, including vacations, of four and one-third ($4 \frac{1}{3}$) years in Afghanistan could be said to amount to a residence there, then respondent could hope to prevail only by showing that the residence was not in good faith. Has respondent proved any want of good faith on the part of petitioner? Like Judge Sibley in the *Swenson* case, *supra*, we think not. *The Court below found none.*

But perhaps respondent contends that petitioner's stay in Afghanistan, now extending to five and one-half years, did not constitute residence at all. If so, petitioner is entitled to refer to respondent's own Regulations, which are the only authoritative sources of law on the subject, and prove his case under these Regulations, (hereinabove set forth, and discussed at length and in detail). Petitioner has proved under those Regulations

that he was not a *mere transient or sojourner* in Afghanistan; that he went to that country with the intent to enter upon a career of employment in that foreign country and, perhaps, others, which would last the remainder of his productive, professional life; that that intent was in his mind when he first departed and has not since changed; that he went to Afghanistan for a purpose that, in its nature, would require many years for its accomplishment, to-wit: the construction of a series of earth-dams and the whole enormous reclamation project, of which they were a part, and that, to that end, he has made his home temporarily in that country, and, finally, that he actually did go there, live there, work and earn his living there and establish residence there, which, we think, was *bona fide*.

Petitioner, according to the foregoing arguments, has made out at least a *prima facie* case for relief under the statute and Regulations. What evidence has respondent introduced to out-weigh it?

The Stipulation states that in petitioner's passport application of April 13, 1946, he stated that his permanent residence was 316 Broadway, Boise, Idaho. Respondent thinks (T.76) this statement inconsistent with "bona fide residence" in Afghanistan. We think respondent's position unsound for several reasons:

First: Judge Stephens, in the *Downs* case, *supra*, quotes *Matter of Newcombs Estate*, 192 N.Y. 238, 84 N.E. 950, for the proposition that a person may have

more than one residence, and, hence, that proof of residence in one place does not disprove residence elsewhere. We agree. Proof that Waddell intended to keep a "permanent residence" in the U. S., as well as domicile there, is not effective to disprove a simultaneous bona fide residence in Afghanistan.

Second: The Stipulation goes on to state that 316 Broadway, Boise, Idaho, is the address of the general offices of Morrison-Knudsen Co., Inc. Obviously, then, that was not petitioner's residence, nor would it ever be. Why did he give such an address? The answer is obvious. His home was broken up; he had no home in the U. S. His "residence" was moving about with him in the U. S. even *before he went* to Afghanistan. He didn't even have an *address* of his own. So he gave in his passport application a mailing address through which he could always be reached. That was then his only address and the closest thing to a "residence" that he had.

A man may have more than one residence but, no matter how bereft, *he is entitled to at least one*. If Waddell had no residence in the U. S., even before he left, certainly he should be entitled to claim residence wherever he went to live and earn his living.

Third: In any event, in that passport application (T.47 & 48), petitioner was giving his "permanent residence" address *as of the time the application was made*, April 13, 1946. That has no bearing upon the situs of his residence at any subsequent date. Further than that,

the address is plainly the address given in support of his statement that he was domiciled in the United States, and there is reason to believe that the statement refers to petitioner's *domiciliary* address rather than to his residence. In any event, the statement does plainly state that the address given is a "permanent residence", which, though it probably refers to a domiciliary address, does not preclude the establishment of that "home temporarily in a foreign country," which respondent says will be sufficient residence to satisfy the requirements of the law.

While we are looking at that passport application (T.47), Waddell expressed his intent to return to the U. S. "within three years." That is exactly what Swenson said in his passport application, *Swenson vs. Thomas*, *supra*.

Prior to June 2, 1947, and apparently on April 28, 1947, (Exhibit A-8) Waddell made application for registration at the U. S. Consulate in Kandahar, Afghanistan, as is required of U. S. citizens living abroad. The application, not dated, is in evidence at Exhibit A-7 (T.51). In it, petitioner states that he has *resided* outside the United States since 1946, in Afghanistan; that his legal residence in the United States is Boise, Idaho, and that he intends to return to the United States within one year to reside permanently. Respondent thinks this is the clincher (T.76). We think it unimportant for several reasons.

The application was made, as above-stated, probably in April, 1947. The form was typed out by someone in the consulate and petitioner signed it because it "looked all right." If petitioner had filled out the blanks personally, the application might have read somewhat differently, as his attention would then have been drawn to the exact wording of the printed form upon which the application was made. However, even so, the intent expressed is the intent of *that date only*.

There is nothing to show that it had existed prior to that date or subsequent thereto. There is evidence (T.93-94), inadvertently elicited by respondent's cross-examination, that if petitioner ever had such an intent it was short-lived, and he never mentioned it to his daughter. In his letters to her he said he liked his work (T.93), was satisfied with his working conditions, and never made any statement that he had changed his mind about continuing to work in Afghanistan. The most that can be said of the application for registration is that it shows, if anything, that on the date thereof only, petitioner intended to return in one year to the U. S. to reside permanently.

In that state of affairs, the respondent, himself, provides the solution. He says (Reg. 111, Sec. 29.211-5):

"A U. S. citizen who has acquired residence in a foreign country retains his status as a resident until he abandons the same and actually departs from the foreign country. *An intention to change his residence does not change his status as a resident*

of a foreign country to that of a resident of the U. S. Thus, a citizen who has acquired a residence in a foreign country is taxable as a bona fide foreign resident for the remainder of his stay in the foreign country.”

As we read the foregoing statement of principle, authored by respondent in a less contentious moment, it is not enough, to defeat petitioner's claim under the law, to prove that at some date during his residence in Afghanistan petitioner momentarily intended to leave Afghanistan one year later and then resume his permanent residence in the United States. Respondent places upon himself the burden of showing that petitioner left Afghanistan and *simultaneously abandoned* his Afghan residence. We do not find in the record any proof of such an abandonment when petitioner left Afghanistan in 1948. We do find proof that, within 24 hours after his arrival at his daughter's home in 1948 (T.90), he said he intended to go right back to his work in Afghanistan, after his vacation, which he then thought might be cut short. That evidence is the *only* proof in the record of petitioner's intent at a date near the date of his first departure from Afghanistan.

Furthermore, in *White vs. Hofferbert*, 88 Fed. Supp. 457 (U.S.D.C. Maryland, 1950), Judge Chesnut said: “The only item of evidence introduced by the defendant (Commissioner) in any way tending to contradict the taxpayer was his statement in filling out a printed

~~form~~
~~from~~ of Application for Registration before the United States Vice Consul at Stockholm in which * * * there was a short sentence reading, 'I intend to return to the United States within *six months* to reside permanently.' * * * However, the statement was entirely satisfactorily explained by the taxpayer. His explanation was that the printed form of application for registration referred to *had relation only to the matter of the validation of his passport* * * *." (Emphasis ours.) Respondent Commissioner *did not appeal* from the adverse holding in that case.

Quite evidently, the printed form signed by White in that case was the same as signed by Waddell here, and for the same purpose. As indicated in the *White* case, *supra*, White was abroad during wartime, and his passport was required to be validated every six months. *He would not have been permitted to state* a period longer than six months in his application. As indicated by Judge Chesnut, in peacetime a passport must be validated every *two years*. Waddell's passport, issued May 2, 1946, was valid to May 2, 1948. As in the case of White, he would not have been permitted to state that he intended to stay abroad past that expiration date. Hence, in April, 1947, he was *required* to state that he intended to return to the U. S. "within one year." At considerable expense to the government, respondent has furnished Exhibit A-8, appearing between pages 51 and 51A of the Transcript, being, in part, the certificate showing that Waddell's passport was on April 28, 1947, extended to May

2, 1948. This would seem to indicate that Judge Chesnut was not misled, and that when application for registration is made by a citizen residing in a foreign country it has relation only to the *validation* of his passport. The passport purports to be in effect for two years after May 2, 1946, which would include the entire period to May 2, 1948. Why, then, does Exhibit A-8 purport to "extend" the passport, on April 28, 1947, to May 2, 1948? The obvious answer is that the passport was *not extended*—it was "validated" to the original expiration date.

Exhibits A-9 and A-10 (T.52A and 52B) show that on May 26, 1948, petitioner applied for *extension* of his passport. Therein he made *no statements* as to his residence or intended length of stay in Afghanistan. He was going home in June, 1948. If he had not intended to return to Afghanistan, but had intended "to return to the United States to reside permanently," as contended by respondent, it appears that he would not have been interested in having his passport renewed for another two years. Exhibit A-6 (T.50) shows that on May 26, 1948, petitioner's passport was extended to May 2, 1950.

Exhibits A-2 and A-5 (T.46 & 49) are documents filled out by Waddell in order to secure a new passport, the former passport having expired May 2, 1950. The second passport appears to have been issued April 27, 1950, and that appears to have been the approximate date of the application. In the application, Waddell states that he is domiciled in the U. S. with "permanent

residence" at 421 8th Street, Huntington Beach, California. He also states that he has *resided* outside the United States in Afghanistan, and gives dates. He estimates as two years the length of his proposed stay abroad (T.49).

Respondent admits (T.23) and the Court below found (T.60) that the premises at 421 8th Street, Huntington Beach, California, were the residence of Major and Mrs. T. A. Burda, petitioner's son-in-law and daughter, that he had no financial interest in that property and had never lived there except as the guest of his daughter. What does petitioner's statement mean? Does it really mean that he had a permanent residence with his daughter and son-in-law? To the contrary, it would seem to be the strongest possible evidence that he had *no home or residence* of his own in this country, and so he gave his daughter's address, which was his business mailing address (T.91-92) in this country.

But, as in the case of his passport application of April 13, 1946, whether the address so given was a domiciliary residence or otherwise, proof thereof would not be sufficient to disprove a temporary home and bona fide residence in Afghanistan, since this Court has held that a person can have two or more "residences." (*Downs* case, *supra*.)

The two passport applications having been thus disposed of, we come back to Judge Chesnut's discussion of the facts he found in *White vs. Hofferbert*, *supra*.

That case seems *exactly* to parallel this case in that, "The only item of evidence introduced by the defendant in any way tending to contradict the taxpayer was his statement in filling out a printed form of 'Application for Registration' before the Vice Consul at Stockholm, in which * * * there was a short sentence reading, 'I intend to return to the United States within six months to reside permanently.' * * * However, the statement was entirely satisfactorily explained by the taxpayer. * * * " We, too, believe that *respondent's only positive evidence* was petitioner's statement, in his Application for Registration, that he intended to return to the United States within one year to reside permanently, and that for the reasons deemed convincing by Judge Chesnut, even that evidence is shown to be only superficial.

(9) MISCELLANEOUS POINTS—

In order to show the extent of respondent's grasp of the facts in this case, we draw attention to the objection appearing at the top of page 99 of the Transcript, wherein Counsel stated, "I think the Stipulation will show that Mr. Waddell was an employee; he was not a supervisory official in any respect." Attached to the Stipulation are Exhibit No. 2 (C-3) (T.25) and Exhibit No. 3 (D-4) (T.35), both of which are headed "SUPERVISORY EMPLOYMENT CONTRACT."

Although it does not clearly appear in the record, we think that respondent's real point is that a citizen, going

abroad under an employment contract with a fixed termination date, cannot possibly become a bona fide foreign resident because he must be held to intend to return at the completion of his contract.

Subparagraphs (5) of paragraph 5 of petitioner's contracts (T.28 & 38) commence with following language: "In the event this contract is not renewed at the expiration of the period of employment provided herein, * * *." This language seems to indicate that the *parties to the contracts do not consider* that the employee is sent to a foreign country for a two-year period, at the end of which he will be discharged, to return home and not come back. Rather, it supports petitioner's contention, that the employment is indefinite, but broken into two-year periods for fiscal reasons. Further, an examination of the decided cases shows that there was a similar contract in the case of *Swenson*, supra, and that such contracts are customary in cases where the employing corporation is sending personnel to distant lands at great expense. The usual thing is to incorporate, as was here done, provisions in the contract, that if the employee will stay on the job for a required *minimum—not maximum*—period, the company will give him a bonus in the form of return transportation, vacation with pay and other inducements. Good foreign service employees are hard to find. When the company finds one, it *keeps* him, if possible.

(10) LENGTH OF RESIDENCE REQUIRED—

There remains one other question: How long must

a citizen live in a foreign country in order that his residence can be deemed "in good faith" and not subject to question?

The statute (Sec. 116, I.R.C.) would seem to indicate that one full calendar year is the minimum, but *enough*. In *Herman F. Baehre*, 15 T.C. 36 (1950), taxpayer lived in Canada for two years and one month and was held to be a bona fide resident. The Commissioner acquiesces.

In *Seeley vs. C.I.R.* (2nd U.S.C.A.—1951) Fed. 2nd; the Tax Court had sustained the Commissioner against the taxpayer. The United States Court of Appeals for the Second Circuit, speaking through the Honorable Learned Hand, reversed the Tax Court, holding taxpayer to be a bona fide resident of England, though he had lived there less than two years—*by five days*. In that case, Judge Hand discusses the whole subject of "bona fide residence in a foreign country," under Sec. 116, I.R.C., and analyzes the statutory and case law and the Regulations with great clarity and true judicial precision. We earnestly direct the attention of this Honorable Court to that fine opinion, not only because of the acute analytical powers employed and the precision of reasoning and exposition displayed by one of the leading jurists of the past two decades, but also because the decision is very recent and, despite the cases which respondent will certainly cite to support his position herein, all, or almost all, were considered by that strong Court and

found unpersuasive in a case very similar on its basic facts to the case at bar. In so doing, the Court re-affirmed the position it had taken in the earlier case of *Bowring vs. Bowers*, 24 Fed. 2nd, 918.

In *Audio G. Harvey*, 10 T. C. 183, taxpayer worked in Colombia under a three-year contract, the facts being almost identical with those in *Swenson vs. Thomas*, *supra*. The Commissioner acquiesces.

In *Myers vs. C.I.R.* (4th U.S.C.A.), 180 Fed. 2nd, 969, taxpayer was abroad only *one year and ten months*. The opinion in this case is strong and well-reasoned, and was concurred in by Chief Judge Parker, one of the illustrious jurists of the Federal Court system in our times. The Court found Myers to be a bona fide resident of a foreign country and, in doing so, follows its earlier decision in *C.I.R. vs. Swent* (4th U.S.C.A.), 155 Fed. 2nd, 513; cert. denied 329 U. S. 801.

In view of the fact that in all of the foregoing cases, the period of foreign residence ranged downward from three years to one year and ten months, it seems that Waddell's residence in Afghanistan, now reaching five and one-half ($5\frac{1}{2}$) years, does not suffer by comparison.

In the case of *Kyle vs. Jones*, (10th U.S.C.A.—1951) ____ Fed. 2nd ____, very recently decided, taxpayer testified that he never intended to stay in Saudi Arabia more than three years. His contract was for 18 months only, and he came home when it was completed. During his

absence, he maintained a home in the U. S., where his wife lived. The Court may have been justified in finding that Kyle was not a bona fide resident of Saudi Arabia under those circumstances, but the facts are sufficiently different from those in the case at bar so as to constitute no precedent, as is pointed out in the opinion which distinguishes the facts from those in *Swenson vs. Thomas*, supra, and *Myers vs. C.I.R.*, supra. But even this opinion is not clear-cut, as will appear from the vigorous dissent of Chief Judge Phillips. Whether Writ of Certiorari will issue in that case is not now known.

CONCLUSION

It is submitted that petitioner has proved his case; that respondent has offered only one item of evidence in opposition and that that item has been satisfactorily shown to be of superficial application only; that petitioner was a bona fide resident of Afghanistan during the entire year 1947 and is entitled to the benefits of Section 116, I.R.C.; that the decision of the Tax Court of the United States heretofore entered herein should be reversed and set aside and that respondent should take nothing from petitioner in this action.

Respectfully Submitted,
JAMES F. BUTLER
400 Continental Bank Building
Boise, Idaho
Attorney for Petitioner.

November, 1951.







